Yellow Freight Systems, Inc. *and* Brotherhood of Teamsters & Auto Truck Drivers, Local 85, International Brotherhood of Teamsters, AFL–CIO *and* John B. Mendez. Cases 20–CA–24053 and 20–CA–24610

November 24, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On February 3, 1993, Administrative Law Judge Jerrold H. Shapiro issued the attached decision in which he found, inter alia, that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire Juan Mendez as a permanent employee (i.e., put him on the seniority list) because he engaged in protected concerted activity, and that the Respondent violated Section 8(a)(1) by threatening to terminate employees immediately if they engaged in an unauthorized walkout, notwithstanding contrary provisions regarding the availability of the discharge sanction in the parties' collective-bargaining agreement. The Respondent filed exceptions[1] and a supporting brief and the General Counsel filed an answering brief. The Respondent then filed a reply brief. We affirm the judge's rulings, findings,[2] and conclusions and adopt the recommended Order.

1. The Respondent does not dispute that its decision to add a casual driver other than Mendez to its seniority roster was, as found by the judge, impermissibly based on Mendez' protected activity. Rather, the Respondent contends, citing *Wright Line*,[3] that it would not in any event have hired Mendez as a permanent employee because of his driving record. In support of its contention, the Respondent points to a memorandum, dated April 24, 1990, about ''Driver Requirements.'' That memorandum calls for rejection of an applicant who has acquired more than one moving violation within the previous 13 to 24 months or more than two moving violations within the previous 25 to 36 months. Other than the uncorroborated and discredited testimony of Mark Kilpatrick, the Respondent's manager of its human resources department for the Tracy (California) Region, the Respondent presented no evidence that the memo had ever been applied in a way that would have disqualified Mendez.[4] The Respondent's exception thus challenges the judge's credibility resolution rejecting Kilpatrick's testimony that he had rejected every applicant for a regular position whose driving record did not meet the criteria of the April 1990 memorandum and that he would have rejected Mendez had he been selected.[5] Absent a clear preponderance of evidence that convinces us that a judge's credibility resolutions are incorrect, the Board's established policy is not to overrule them.[6] We find no basis in the record for reversing the judge's findings.

Indeed, the Respondent's conduct, as revealed by the record, belies its assertion that Mendez' driving record disqualified him from being added to the seniority roster. For 4-1/2 months, the Respondent had full knowledge of Mendez' driving record; yet it proceeded with a background check, a drug scan, a physical examination, an accident investigation, and a personal interview subsequent to its receipt of that information. Some of these steps involved participation by the Respondent's central labor relations office.

When Mark Graybill, the Respondent's South San Francisco branch operations manager, mentioned to Mendez in late November that there was a problem with his driving record, Mendez noted that two of his violations would be removed by the end of January. Graybill did not then nor thereafter mention that their removal would not resolve the problem. To the contrary he replied that in that case ''sometime after January or February, we'll put you on the seniority list.'' Then, at the beginning of March, Graybill scheduled Mendez for an interview with Michael Bloss, manager of the South San Francisco branch. When Bloss interviewed Mendez, he also failed to mention that

[1] No exceptions have been filed to the judge's finding that the Respondent violated Sec. 8(a)(1) by questioning Mendez during his employment interview about his union sentiments, by threatening that it would not hire employees who actively pursued their rights under Sec. 7 of the Act, and by stating that the Respondent did not intend to hire Mendez because he had been seen talking with a shop steward.

[2] In adopting the judge's decision, we note that he failed to resolve certain inconsistencies between the testimony of Union Steward Raymond Cozette and Branch Operations Manager Mark Graybill. Cozette testified that there was an agreement to add Mendez to the Respondent's seniority roster because he had worked more shifts than the other casual drivers, while Graybill testified that he had agreed to add Mendez because he was the best driver. Resolution of this disparity would not affect the outcome of the case, in view of the judge's core reliance on the undisputed fact that there had initially been an agreement to hire Mendez.

The judge also refers at one point in his analysis to the Respondent's failure and refusal to hire Giorlando. It is clear from the context, however, that Mendez' name should replace Giorlando's at that place in the decision.

[3] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[4] We note that Mendez was already driving for the Respondent, albeit on a casual basis.

[5] The Respondent failed to introduce any documentary evidence that any driver had been rejected who had a driving record inconsistent with the requirements set out in the memo. The Respondent in its reply brief refers to art. 41 of the contract which provides for the discontinuance of casual employees should they not meet the employer's hiring standards and qualifications. We note that Mendez never had his employment as a casual discontinued, which further detracts from the Respondent claim that Mendez did not meet the Respondent's employment criteria.

[6] *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

Mendez' driving record was a problem. Instead he questioned Mendez about his views of the Union, warned him that he was falling out of favor because of his pursuit of grievances, and told him he would never be hired if he hung around with the ''wrong people.'' In view of the foregoing, we agree with the judge that the Respondent's post hoc rationale is pretextual, thus eliminating its *Wright Line* defense.[7]

2. The Respondent has excepted to the judge's conclusion that it violated Section 8(a)(1) of the Act by threatening to terminate employees if they walked out in a dispute over their union representative's access. It argues that the anticipated walkout did not amount to protected activity because it would have abrogated the ban against walkouts in the parties' collective-bargaining agreement. In connection with its argument, the Respondent also urges us to reexamine the Board's holdings in *Wagoner Transportation Co.*[8] and *Food Fair Stores*.[9]

As the judge reports, in *Wagoner* and *Food Fair*, the Board held that provisions in the respective collective-bargaining agreements, like those in the instant case, which limited the employer's disciplinary options to something short of discharge for participation in an unauthorized strike of less than 24 hours, rendered engagement in such action protected activity under Section 7 of the Act. The Board held the no-strike clauses in the same agreements did not waive employees' Section 7 rights not to be discharged for striking. In denying enforcement in *Food Fair*, the United States Court of Appeals for the Third Circuit held that the restriction on discipline did not create an exception to the contractual ban on strikes, and therefore did not preserve employees' statutory right to engage in a walkout of less than 24 hours. We respectfully disagree.

It is well established that the waiver of a statutory right, such as the right to strike, must be ''clear and unmistakable.'' *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). The parties' collective-bargaining agreement in the instant case limits the right to strike, but does not totally waive it. Although the parties' master agreement prohibits walkouts in all but a few situations, which are irrelevant here, the same article of the master agreement provides that the local union shall, if an unauthorized work stoppage occurs, make every effort to persuade employees to return to work.

> Regarding discipline, the Employer:
>
> during the first . . . [24 hours] of such unauthorized work stoppage . . . shall have the sole and complete right of reasonable discipline, including suspension from employment, up to and including thirty (30) days, but short of discharge, and such employees shall not be entitled to or have any recourse to the grievance procedure. In addition . . . if any employee repeats any such unauthorized strike . . . during the term of this Agreement, the Employer shall have the right to further discipline or discharge such employee without recourse for such repetition. After the first . . . [24 hours] of an unauthorized stoppage . . . and if such stoppage continues, the Employer shall have the sole and complete right to immediately further discipline or discharge any employee participating in any unauthorized strike . . . and such employees shall not be entitled to have any recourse to the grievance procedure.

Thus, in the give and take of negotiating an agreement, the Respondent has agreed to a restricted right for employees to engage in a limited work stoppage without fear of discharge, albeit for only once during the term of the collective-bargaining agreement. In exchange, the Union has promised to exert its power to get employees back to work quickly, thereby minimizing any business disruption. Under such circumstances, the Respondent's right to discipline is not unfettered and the employees have not clearly and unmistakeably granted a total waiver of their right to strike. Their limited right to strike without fear of discharge remains protected under Section 7 of the Act. Accordingly, as in *Wagoner*, the Respondent's threat to terminate employees who exercised that right violated Section 8(a)(1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Yellow Freight Systems, Inc., South San Francisco, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Paula R. Katz, for the General Counsel.
Ronald E. Sandhaus, for the Respondent.
Andrew H. Baker (Beeson, Tayer & Bodine), for the Union.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge. This proceeding, in which I held a hearing on August 27–28, 1992, is based on unfair labor practice charges filed against Yellow Freight Systems, Inc. (Respondent), by Brotherhood of Teamsters & Auto Truck Drivers, Local 85, International Brotherhood of Teamsters, AFL–CIO (the Union), in Case 20–CA–24053 on June 11, 1991, and by John B. Mendez (Mendez), in Case 20–CA–24610 on April 22, 1992. The Regional Director for Region 20 of the National Labor Rela-

[7] See *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

[8] 177 NLRB 452 (1969), enfd. 424 F.2d 628 (6th Cir. 1970) (per curiam).

[9] 202 NLRB 347 (1973), enf. denied 491 F.2d 388 (3d Cir. 1974).

tions Board (the Board), on behalf of the Board's General Counsel, issued a complaint in Case 20–CA–24053 on July 30, 1991, and a complaint in Case 20–CA–24610 on May 28, 1992, and on May 28, 1992, issued an order consolidating these cases for hearing.

The complaint in Case 20–CA–24053 alleges that on May 28, 1991, Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act), when Mike Bloss, the terminal manager of its South San Francisco, California facility, engaged in the following conduct: ''in the presence of employees, denied the Union's authorized agent access to employees for the purpose of investigating and processing grievances''; ''calling the police and, in the presence of employees, threatening to have the Union's authorized agent arrested''; and ''threatened to terminate employees if they engaged in Union and other protected concerted activities.'' Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.

The complaint in Case 20–CA–24610, as amended at the hearing, alleges that the Respondent violated Section 8(a)(1) of the Act, when Mike Bloss, its South San Francisco terminal manager, engaged in the following conduct: on March 6, 1992, ''interrogated employees about their union and/or protected concerted activities'' and ''threatened that it would not hire employees who engaged in Union or other protected concerted, activities,'' and early in March 1992, ''told employees that an employee would not be hired because he engaged in Union or other protected, concerted activities.'' The complaint further alleges that ''since on or about April 1, 1992, Respondent has refused to hire [Mendez]'' because of his Union or protected activities, and by refusing to hire Mendez violated Section 8(a)(1) and (3) of the Act. Respondent filed a timely answer to the complaint and to the amended complaint, denying the commission of the alleged unfair labor practices.[1]

On the entire record,[2] from my observation of the demeanor of the witnesses, and having considered the posthearing briefs of the General Counsel and Respondent,[3] I make the following

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Setting*

Respondent, a corporation, is a trucking company engaged in the transportation of freight throughout the continental United States. Its only facility involved in this case is its terminal located in South San Francisco, California, where, during the times material, it regularly employed between 40 and 50 truckdrivers and dockworkers.

The Union is the exclusive collective-bargaining representative of the dockworkers and truckdrivers employed at the South San Francisco terminal. The Respondent and Union are parties to two collective-bargaining agreements which govern the terms and conditions of employment of these employees. These agreements, both of which are effective by the terms from April 1, 1991, through March 31, 1994, are respectively entitled, ''National Master Freight Agreement'' (National Agreement), and ''Local Pickup and Delivery Supplemental Agreement'' (Local Agreement). The agreements include a grievance procedure which covers any grievance or controversy affecting the mutual relations of the parties.

During the time material, Terry Hart was the Union's business representative who, on the Union's behalf, represented the dockworkers and truckdrivers employed by Respondent at the South San Francisco terminal. Raymond Cozzette, Charles McLin, and Lawrence Holland were employed during the time material at the terminal as truckdrivers. They also were union shop stewards and assisted Hart in representing the bargaining unit employees.

Since February 1991, Michael Bloss has been employed as manager of the South San Francisco terminal. He has overall responsibility for the operation of the terminal. Next in the managerial chain-of-command is Mark Graybill, who has held the position of terminal operations manager since August 1990. Graybill's job as operations manager is to oversee the day-to-day operation of the terminal. Next in the supervisory chain-of-command, during the times material, were Operations Supervisors Matt Hilton, Mike Johnston, Gary Margolis, and Mike Vega. During all times material Bloss, Graybill, Hilton, Johnston, Margolis, and Vega, in their respective positions, were supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent.

B. *Respondent's Refusal to Hire Mendez as a Regular Employee (Case 20–CA–24610)*

1. The evidence

Respondent employs approximately 40 plus dockworkers and truckdrivers classified as ''regular'' employees at its South San Francisco terminal, whose names are listed in the order of their seniority, on a roster referred to as the seniority list or roster. The ''regular'' dockworkers and truckdrivers are called to work in the order of their seniority. Only after they all have been offered the available work can Respondent, under the terms of its agreement with the Union, employ other employees, referred to as ''casual'' employees. Respondent hires its casual employees through the Union's hiring facility, as required by its agreement with the Union, and on most occasions calls for its casuals by name. During the time material, Charging Party Mendez, who is a member of the Union, was employed by Respondent as a casual truckdriver at its South San Francisco terminal. He was employed by Respondent, after being referred to Respondent from the Union's hiring hall facility.

Under certain circumstances, Respondent is required by the terms of its agreements with the Union to add one or more casual employees to its seniority roster of regular employees. When and how Respondent does this, is established by terms of the agreements, as follows.

The agreements provide that ''[a] casual is an individual who is not on the regular seniority list'' and that ''[a] casual may be either a replacement casual or a supplemental cas-

[1] In its answers to the complaints herein, Respondent admits it meets one of the Board's applicable discretionary jurisdictional standards and is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act, and that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[2] General Counsel's unopposed motion to correct transcript is granted.

[3] General Counsel's unopposed motion to accept late filed brief is granted.

ual'' and that ''[r]eplacement casuals may be utilized by an Employer to replace regular employees who are off due to illness, vacation or other absence.''

The National Agreement provides:

> Starting with the quarter beginning April 1991 and continuing each quarter thereafter, the Employer shall add one additional employee to the regular seniority list for each sixty-five vacation replacement days worked by a casual during each vacation quarter.

The Local Agreement provides:

> Any casual . . . used by the Employer for seventy (70) eight (8)-hour shifts within six (6) consecutive months shall be placed on a preferential hiring list for future regular employment, and shall be selected for regular employment in the order in which he/she was placed on the preferential hiring list. . . . His/her seniority date will be the date he/she is put on the seniority list. Failure of the Employer to add casuals from the preferential hiring list in this order shall subject the Employer to a runaround claim.
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> Casual employees on the preferential hiring list shall be offered available extra work in seniority order by classification as among themselves.

The hiring procedure used by the Respondent's South San Francisco terminal, when it adds another regular employee to its seniority list, is as follows. The applicant is selected from among the employees currently being employed as casuals at the terminal, with those classified as preferential casuals being given preference.[4] All applicants, including those classified as preferential casuals, who are being considered must fill out a series of forms such as a United States Department of Transportation (DOT) driver's written examination, a motor vehicle driver's certification and a DOT driver's road test. Additionally, the applicants sign receipts for various instructional manuals, material handling guides, and manuals covering Federal safety regulations. The applicants are then given a physical examination, which includes an alcohol/drug screen test. Lastly, a background investigation is ordered. All of the above-described paperwork is transmitted to the Respondent's regional human resources department (HRD) located in Tracy, California. The personnel employed in the HRD review all of the paperwork covering an applicant to determine if he/she meets all applicable companywide criteria.

On September 6, 1991, Terminal Manager Bloss and Operations Manager Graybill met in Bloss' office with Union Representative Hart and Union Stewards McLin and Cozzette. One of the topics discussed was the applicability of that provision in the National Agreement which provided that,

> [s]tarting with the quarter beginning April 1991, and continuing each quarter thereafter, the Employer shall add one (1) additional employee to the regular seniority list for each sixty-five (65) vacation replacement days worked by a casual during each vacation quarter.

Hart, the union spokesperson, took the position Respondent had been using an excessive number of casuals as vacation replacements and in view of the aforesaid contractual provision was obligated to add additional regular employees to the seniority list. Bloss, Respondent's spokesperson, disagreed as to the number of regular employees Hart claimed Respondent was obligated to add to the seniority list, but agreed to investigate Hart's claim and stated if his investigation revealed it had merit, Respondent would add more regular employees to the seniority list. The meeting ended with Bloss and Hart agreeing to check their respective records to determine the actual number of regular employees that Respondent, by virtue of the aforesaid contract provision, was obligated to add to the seniority list.

This description of the September 6 meeting, including the date of the meeting, is based on the mutually corroborative testimony of General Counsel's witness Hart and Respondent's witness Bloss. I considered that General Counsel's witnesses McLin and Cozzette testified that Bloss agreed to add two employees to the seniority list and also testified that what the parties agreed to research was who those two employees would be. However, their testimony was not corroborated by the testimony of Hart, the Union's spokesperson at this meeting. Instead, Hart's testimony about the meeting in essence corroborated Bloss' testimony, and contradicted McLin's and Cozzette's. In this respect Hart testified that the meeting concluded with Bloss stating he would check Respondent's records and if the records substantiated Hart's allegations that Respondent needed to hire more regular employees that Respondent would comply. Thus, it is clear from Hart's testimony that Bloss did not agree to add two regular employees to Respondent's seniority list and to check Respondent's records to determine the identity of the two whom it intended to add.

However, Operations Manager Graybill testified that he reached an agreement with Cozzette that Graybill, for the Respondent, and Cozzette, for the Union, would check their respective records to determine the number of shifts worked by casual drivers Cromartie, Mendez, and Giorlando, for the purpose of determining which of them would be added to the seniority roster, if Respondent was obligated to add a casual or casuals to its seniority roster of regular employees.

In September 1991, following the September 6 meeting, Union Shop Steward Cozzette informed Operations Manager Graybill he had checked the Union's dispatch records and they showed that casual drivers Cromartie and Mendez had worked the most shifts and therefore should be the two casuals added to Respondent's seniority list. Graybill agreed this was what the Respondent's records revealed and stated that because Cromartie had worked the most shifts Respondent would hire him and a week later would hire Mendez. Graybill also stated he would arrange for Cromartie and Mendez to take their physical examinations.

In September 1991, following the September 6 meeting, Chief Union Shop Steward McLin asked Graybill, in substance, when Respondent intended to add Cromartie's and

[4] As set forth in the governing collective-bargaining agreement, supra, if a casual works 70 8-hour shifts in 6 consecutive months he/she is placed on a preferential hiring list for future regular employment and is given preference not just for casual work assignments, but when Respondent adds another individual to its seniority list, preferential casuals must be offered the positions in the order they were placed on the preferential hiring list.

Mendez' names to the seniority list. Graybill replied by stating he did not know because Respondent had not completed the necessary paperwork, but assured McLin that Respondent intended to place Mendez' and Cromartie's names on the seniority roster.

The above-described September 1991 conversations between Graybill and Cozzette and McLin are based on Cozzette's and McLin's testimony. When asked whether he recalled having any discussions with McLin or Cozzette about placing Mendez on the seniority roster, Graybill's testimony was vague and evasive; he testified that while he did not ''recall'' speaking with McLin or Cozzette about that subject, he might have done so, but testified he did not ''specifically recall'' making representations to ''anyone'' about whether or not Mendez would be hired, and further testified that as a result of his research of the Company's records he only agreed to hire Cromartie, not both Cromartie and Mendez.

I rejected Graybill's testimony and credited the testimony of McLin and Cozzette because when they gave their aforesaid testimony their testimonial demeanor was good, whereas when Graybill gave his aforesaid testimony his testimonial demeanor was poor. In addition, McLin's and Cozzette's testimony that in September 1991 Graybill agreed to add Mendez' as well as Cromartie's names to the seniority roster is corroborated by the fact that commencing in late October 1991, as described in detail infra, Graybill arranged for Mendez, as well as Cromartie, to fill out all of the paperwork and to take all of the examinations which Respondent requires of applicants, whom it intends on adding to its seniority roster.

On or about September 24, 1991, when Mendez came to work, he was called to Graybill's office, at which time Graybill asked him if he liked working at the Respondent's South San Francisco terminal, asked where he lived, and discussed the fact that Mendez had also worked for Respondent at its terminal in Tracy, California, and stated that Mendez might be in luck because Respondent was ''looking to hire two people here in this terminal and we are considering to hire you and Bill Cromartie.'' Mendez indicated he was happy to hear this. Graybill told him Respondent intended to start processing his application and told him that after the application had been processed and a background check had been conducted, that Graybill would arrange for Mendez to take a physical examination which included a drug test. Graybill did not indicate that Mendez' qualifications must be reviewed by Respondent's HRD.

The aforesaid description of Mendez' conversation with Graybill is based on Mendez' testimony. Graybill testified that sometime in October 1991 he asked Mendez if he was interested in a job as a regular employee with Respondent and, when Mendez answered in the affirmative, Graybill told him to complete the necessary paperwork and take the necessary examinations and specifically told him that whether or not he would be hired was dependent on the decision of Respondent's HRD. I credited Mendez' testimony because his testimonial demeanor, which was good, was better than Graybill's when they testified about this conversation.

On or about October 25, 1991, Graybill gave Mendez the documents he had to fill out and be familiar with, as a condition of being hired by Respondent as one of its regular employees. These documents which Mendez promptly filled out and returned to Graybill, or acknowledged he had read them by signing a receipt, included the following: driver's written examination; motor vehicle driver's certification; hazardous material shipments guidelines for casual drivers and dockworkers; hazardous materials handbook; work safety with chemicals pamphlet; Federal Motor Carrier Safety Regulations; worker's compensation pamphlet. Graybill, when he gave these documents to Mendez, told Mendez that he would then have to take a physical examination, which would include a drug/alcohol test, after Respondent had completed his background investigation. A few days later Graybill notified Mendez that he had passed the background investigation and that his physical examination was scheduled for November 4, 1991. On that date, Mendez in fact took the physical examination and passed.

During this period of time (late October 1991) casual employee Cromartie filled out and familiarized himself with the same preemployment documents as Mendez and, like Mendez, his background was investigated and he passed that investigation and, like Mendez, he was given and passed a physical examination. Unlike Mendez, he was hired by Respondent as one of its regular drivers and added to its seniority roster on November 18, 1991.

In 1991 Cromartie and Mendez were the only casuals employed by Respondent who Respondent treated as if it intended to hire as regular employees. I have considered that Bloss and Graybill testified that in September and October 1991 Respondent was also considering the addition of three of its casuals to the seniority roster: Cromartie, Mendez, and Giorlando. It is undisputed, however, that Respondent never had Giorlando undergo the above-described preemployment process which Cromartie and Mendez were required to go through and which the record reveals Respondent requires of all of its casuals as a condition of their being hired as regular employees. Neither Bloss nor Graybill were able to give a reasonable explanation of why, if, during the period of September–October 1991, they were considering the hire of Giorlando as a regular employee, they failed to have him, like Mendez and Cromartie, undergo the preemployment process it requires of all of its applicants for employment. Under the circumstances, I find that Respondent during the fall of 1991 was not considering Giorlando as one of the casuals it intended to add to its seniority roster.

During the fall of 1991 the Union took the position that Respondent, under the terms of its collective-bargaining agreements with the Union, was obligated to add several casuals to its seniority roster of regular employees, because of the number of vacation replacement days worked by casuals. Respondent disagreed that it was obligated to add that many. It did conclude, however, that it was required to add two casuals to its seniority roster of regular employees (Tr. 448–449). It was apparently based on this conclusion that Operations Manager Graybill, as I have found supra, agreed to add both Cromartie and Mendez to the seniority roster.

The Union, however, was not satisfied with Respondent's agreement to add two of its casuals to the seniority roster of regular employees, and on November 4, 1991, filed a written contractual grievance, under the contractual grievance-arbitration procedure, alleging that during the relevant 6-month period Respondent had employed casuals to work a total of 425 vacation replacement days and that because of this Respond-

ent was obligated to add six casuals to its seniority roster of regular employees.

On receipt of this grievance, Bloss immediately spoke to Respondent's area labor relations manager about the matter. The area labor relations manager told Bloss that the Union's grievance was untimely as to the great bulk of the vacation replacement days worked by the casuals and that because of this the grievance was meritorious only insofar as it would obligate Respondent to add one casual employee, Cromartie, to its seniority roster, because Cromartie had worked a sufficient number of hours to become a preferred casual, under the terms of the collective-bargaining agreement. On November 18, 1991, as I have found supra, Respondent added Cromartie to its seniority roster of regular employees.

Graybill testified that early in November 1991, Bloss told him it would be unnecessary for Graybill to continue processing Mendez' employment application for regular employment. Graybill further testified that Bloss explained that Respondent was not obligated to add any one to its seniority roster of regular employees, as contended by the Union, because the Union's grievance was untimely.

Graybill also testified that he then, still early in November 1991, telephoned Respondent's human resources department (HRD) located in Tracy, California, and spoke to Mary Yelton, the assistant to the HRD manager for the Tracy region. He testified he told her that in view of the cost associated with the process of handling employment applications and the time it takes up, that the HRD did not have to continue to process Mendez' application because ''there was not going to be a hire . . . we were not going to hire anyone,'' and that Yelton replied, ''Okay, that's fine,'' and this ended the conversation.

On or about November 7, 1991, Graybill spoke to Mendez and told him he could not hire him as a regular employee right then, but would do so sometime in December 1991, and told him that in the interim he would work him as much as possible, that whenever he had work for a casual driver he would treat Mendez like a ''preferred casual'' and have the Union's hiring hall facility refer Mendez ahead of any other casuals for Respondent's work. Graybill gave Mendez no reason why Respondent had to postpone his employment as a regular employee.

The above description of Graybill's conversation with Mendez is based on Mendez' testimony. I considered that Graybill testified that in November 1991 he specifically told Mendez, ''we would not be hiring anyone based on the grievance and the untimeliness issue,'' and his further testimony that he never informed Mendez that he would be given preference in work assignments over other casuals, or used words to that effect. I rejected this testimony and credited Mendez' aforesaid testimony because Mendez' testimonial demeanor was good, whereas Graybill's was poor, when they testified about these matters. In addition, Mendez' testimony that Graybill did not indicate to him that Respondent had stopped processing his employment application and was not going to hire him as a regular employee, but instead indicated that his hire had only been temporarily postponed, is corroborated by Graybill's subsequent conversations with Mendez and with Union Shop Stewards McLin and Cozzette, set forth, infra.

On November 12, 1991, while making a delivery for the Respondent, the truck which Mendez was driving damaged the customer's property. That same day Mendez submitted an accident report to Respondent and a few days later was informed by Graybill that the Company would have to investigate the accident and if it determined Mendez was at fault, it would not be able to hire him. Later that month, Graybill informed Mendez that the Company's investigation had cleared him of any responsibility in connection with the aforesaid accident and it would not be held against him, but there was now an issue concerning Mendez' ''driving record.'' Mendez stated his driving record had not previously been an issue and asked why it had now become an issue. Graybill answered, ''because [of] the insurance.'' Mendez stated that two of the four moving traffic violations which were on his traffic record would be removed in January 1992. Graybill replied that in that case ''sometime after January, or in February, we'll put you on the seniority list.''

It is undisputed that Mendez had received four moving traffic citations on the following dates: January 5, 1989; February 6, 1989; May 27, 1990; and August 21, 1990. It is also undisputed that Mendez received no further traffic citation in 1991 or 1992. The State's motor vehicle regulations provide that traffic citations are automatically removed from a driver's record after 3 years.

In January 1992 the Union's chief shop steward, McLin, asked Graybill why Respondent had not added Mendez' name to its seniority roster. Graybill answered that Mendez had either one or two moving traffic citations that were supposed to be cleared up in the near future and until those citations had been removed from his record, ''they would hold off on things,'' but would consider hiring him when the citations were removed from his record.

During the period from late January 1992 through mid-February 1992, on three or four different occasions, Union Shop Steward Cozzette asked Graybill why Mendez had not been hired and was informed that the reasons for Respondent's failure to add Mendez' name to the seniority roster was that Mendez' paperwork had not returned from Respondent's general office. However, in the last such conversation Cozzette had with Graybill in February 1992, Graybill, who initiated the conversation, stated that the reason Mendez had not been hired was because he had not passed his drug-alcohol test, that the results had come back ''positive.''[5]

Late in 1991 or early in 1992 Mendez asked Operations Supervisor Mike Johnston why Johnston that day had assigned overtime work to casual driver Giorlando without first offering Mendez the opportunity to work the overtime. Mendez stated he thought he was entitled to work the overtime. Johnston replied it was the Company's policy to assign overtime on a first-come-first-serve basis and since Giorlando had been there ahead of Mendez he was assigned the overtime.

A few days later, while in the Company's breakroom, Mendez complained to Union Shop Steward Cozzette about this; he told Cozzette what had happened and that he felt Johnston should have asked him to work the overtime instead of Giorlando and that Johnston had informed him the

[5] Based on Cozzette's testimony. Graybill denied telling ''anyone'' that Mendez could not be added to the seniority roster because he did not pass the drug test, and further testified that if an employee flunks the drug test Respondent cannot employ him. I credited Cozzette's testimony because his testimonial demeanor was good when he gave this testimony, whereas Graybill's was poor.

Company assigned overtime work to the casuals on a first-come-first-serve basis, and asked Cozzette whether they could do that. Cozzette replied he would look into the matter and if he discovered the Respondent was not following the collective-bargaining agreement he would file a grievance. The record establishes that Mendez' conversation with Cozzette was overheard by Operations Supervisor Hilton who was sitting at the time only a few feet away in the Company's dispatch office.

Late in December 1991 or in January 1992 Mendez complained to Operations Manager Graybill that Respondent was not calling him for the available casual work, and asked if he had done sometime wrong, and reminded Graybill that Graybill had previously assured him that in the interim, before Respondent hired him as a regular employee, it would give preference to him for the available casual work. Graybill told Mendez he had done nothing wrong and indicated he did not know why Mendez was not being called for the casual work because it was Operations Supervisor Hilton, not Graybill, who did the dispatching for the Company. Mendez promptly spoke to Hilton, who explained to Mendez that Hilton's failure to ask the Union to refer Mendez for casual work was due to the fact that Hilton had forgotten Mendez' name.

Immediately after his conversations with Graybill and Hilton, Mendez spoke to Union Shop Steward Cozzette and told him that although Graybill had promised that Respondent would give him preference when it assigned casual work, that he was being bypassed by Respondent for this work in favor of other casuals. Also in late December and in January 1992, Mendez spoke to Cozzette about this problem on two or three occasions. Subsequently, in about February 1992, Cozzette went to Graybill and asked why Respondent was working around Mendez and using other casuals. Graybill denied Respondent had been doing this. He told Cozzette that when they called the Union for casuals that they asked for Mendez by name, but ''they could not get a hold of him.''

In February 1992 Mendez complained to Union Shop Steward Cozzette that when Respondent requested that the Union refer him for casual work, it was specifying that he be referred for the work shift which starts at 9 a.m. rather than for the earlier 8 a.m. work shift, which was the more desirable shift. Cozzette went to Graybill and spoke to him about this complaint; he asked why Mendez was being called into work on the late shift so often, as it meant he would be stuck in all of the commuter traffic while making pickups and deliveries. Graybill did not answer the inquiry, but instead he referred to Mendez' previous complaint about not being assigned casual work; he remarked, ''we're not going around him, we're working him.''

Also in February 1992, Mendez complained to Union Shop Steward Cozzette that, although Respondent was asking the Union to refer him for work as a heavy-duty driver, Respondent in fact was employing him as a bobtail truckdriver, which is a more onerous job than driving a heavy-duty truck. Cozzette went to Graybill and asked why Respondent was having the Union refer Mendez as a heavy-duty truckdriver and then was dispatching him for work as a bobtail driver. Graybill's response was that it made no difference because Mendez was being paid the same rate of pay regardless of the type of truck he drove. Cozzette pointed out that, although the compensation might be the same, there was a big difference in the work involved. Graybill ended the conversation by stating that as far as the Company was concerned, because Mendez was paid the same for driving a bobtail as he was for driving a heavy-duty truck, it did not make any difference which work he was assigned.

The findings of fact immediately above, concerning Mendez' complaints, which Union Shop Steward Cozzette spoke about to Operations Manager Graybill, are based on Cozzette's testimony. Graybill was not questioned about any of the above-described conversations he had with Cozzette about Mendez' complaints, nor did Graybill specifically deny Cozzette spoke to him, on Mendez' behalf, as described above. However, after having testified to the effect that he knew Mendez had expressed the above-described complaints, Graybill was asked whether Mendez personally expressed those complaints to Graybill or whether someone else had brought them to Graybill's attention? Graybill answered the question by testifying, ''I heard about them from the dispatcher, Matt Hilton.'' If by this Graybill meant to deny Cozzette also spoke to him about Mendez' complaints, I do not credit it because when Cozzette testified about his conversations with Graybill, his testimonial demeanor was good, whereas when Graybill testified about matters involving Respondent's alleged unlawful refusal to hire Mendez his testimonial demeanor was poor.

In February 1992, subsequent to February 12, Operations Supervisor Hilton informed Terminal Manager Bloss he felt Mendez had developed ''an attitude problem.'' Hilton explained to Bloss he had reached this conclusion based on a conversation overheard between Mendez and Union Shop Steward Cozzette, which had led Hilton to believe that based upon information concerning the collective-bargaining agreement which Cozzette was giving to Mendez, that Mendez was asking Respondent for certain things which Respondent could not give him (Tr. 577–578). It is also undisputed, according to Bloss' testimony, that at the same time as Hilton made the aforesaid remarks to Bloss, that ''[Bloss] asked [Hilton] a few questions because [Hilton] had heard some things just in passing'' concerning ''a bobtail and an overtime issue, and [Hilton] gave [Bloss] some brief comments'' about what Mendez was asking for in connection with those issues and told Bloss that Mendez was making those demands of the Company because of the advice he was receiving from Union Shop Steward Cozzette (Tr. 579).

Cozzette, in his capacity as the union shop steward, filed a lot of grievances on behalf of the unit employees and zealously policed the Respondent's compliance with the terms of the governing collective-bargaining agreements, and when he believed Respondent had violated the terms of those agreements would promptly file grievances. It is also undisputed that Bloss was unhappy when he learned from Hilton that Mendez, based on information received from Cozzette, had been complaining about certain working conditions. Bloss was unhappy about this state of affairs because, in his opinion, Cozzette abuses his position as union shop steward by giving misinformation to employees.

Bloss also testified he views Cozzette as a ''troublemaker'' and has publicly called him a ''troublemaker.'' Bloss testified that his opinion of Cozzette as a ''troublemaker'' stems from the way Cozzette conducts himself as the Union's shop steward; whenever Cozzette learns of an al-

leged violation of the collective-bargaining agreements, Bloss feels that he should first come to Bloss and attempt to settle the matter informally, whereas, according to Bloss, Cozzette's practice is to immediately file a written contractual grievance before discussing the matter with Bloss, and it is because of this conduct that Cozzette is viewed by Bloss as a ''troublemaker.''

As found, supra, on November 4, 1991, the Union filed a contractual grievance against Respondent alleging, in substance, that during a relevant 6-month period Respondent had employed casuals to work a total of 425 vacation replacement days and because of this it was obligated under the terms of the collective-bargaining contract to add six casuals to its seniority roster of regular employees. Subsequently, on February 12, 1992, the representatives of the Union and Respondent agreed to settle this grievance. Under the terms of the February 12, 1992 settlement, the Respondent agreed to add one regular employee to its seniority roster by April 1, 1992.

Following the aforesaid described February 12, 1992 settlement of the Union's grievance, Graybill informed Mendez about the job opening, but advised him that since some other people had exhibited a desire for the job, that Mendez would have to be interviewed for the position. Thereafter, on March 5, 1992, Graybill asked Mendez to come to the terminal on March 6 to be interviewed by Bloss.

On March 5, the day before the interview, according to Bloss' testimony, Operations Supervisor Hilton told Bloss that he wondered whether Mendez would show up for the interview because Union Shop Steward Cozzette had advised Mendez it was not necessary for him to be interviewed, and Mendez had indicated he would listen to Cozzette's advice. Bloss also testified, ''[s]o I had heard that [referring to Hilton's aforesaid March 5 comment], and I had heard all these other things on overtime, bobtail, various things,'' that Hilton had prior to March 5 told him that he had overheard Mendez and Cozzette speaking about (Tr. 586–587).

On March 6, 1992, Bloss interviewed Mendez in his office, just the two of them. The interview lasted for approximately 30 to 40 minutes.

Bloss covered the following topics: he questioned Mendez about the contents of the application Mendez had submitted to Respondent; he questioned Mendez about how he liked working for Respondent; he questioned Mendez about his religion inasmuch as Mendez was wearing a T-shirt with a religious message; he described the type of atmosphere he wanted on the job; and the interview ended with Bloss stating he would know within a week, who was going to be added to the seniority roster and would notify Mendez of the Company's decision.

Besides covering the above-described topics, Bloss also asked Mendez ''what had [he] thought about the Union?'' Mendez answered that the reason he was a union member was he could not get the job he was being interviewed for without being a member of the Union. Bloss then brought up the subject of the Respondent's collective-bargaining agreement with the Union. Bloss told Mendez he was tired of how the Union interpreted the contract. He stated he interpreted it different than the Union and stated Mendez should be careful who he was seen talking to and warned him that if he was observed talking to or hanging around with the ''wrong people,'' he would never be hired to work at the Respondent's South San Francisco terminal.

Also, Bloss mentioned he had heard Mendez had a problem with Operations Supervisor Johnston concerning overtime work. Mendez explained to Bloss what had occurred between him and Johnston. Bloss stated that Mendez was falling out of favor with Respondent's supervisors because he was filing grievances charging supervisors with bypassing him for work. Mendez replied he had not filed any grievances, that if Bloss checked with the Union he would discover Mendez had not filed any grievances against Respondent. Mendez told Bloss that he was just trying to keep his nose clean and get the job. Bloss remarked that he intended to hire who he wanted to hire and not the person the Union was going to make him hire.

The aforesaid description of the March 6 interview is based on Mendez' testimony. Bloss' testimony differs sharply from Mendez' in all significant respects, as set forth below.

Bloss testified that he and Mendez discussed the following: the information contained in Mendez' employment application; the fact that as indicated on his T-shirt Mendez was a born again Christian; Mendez' ability to get along with Respondent's customers; Bloss asked Mendez how he felt about Respondent's other employees and management staff and also asked him ''how do you feel about the people at Local 85'' and that Mendez responded to this last question by stating, ''they're a pretty good group of guys. I get along with them pretty well''; and the interview ended with Bloss stating that in making his decision on whether or not to hire Mendez he would take into account, besides the interview Mendez' performance while employed by Respondent during the month of February, and also stated he had at least one more applicant to interview and would notify Mendez of the Company's decision.

Bloss also testified that he began the interview by telling Mendez that he wanted Mendez to know Bloss had been hearing ''a lot of things'' about Mendez which Respondent's supervisors did not understand, that it was Bloss' understanding Mendez was ''upset about some issues,'' that Respondent's supervisors did not understand Mendez' problems, and declared ''let's talk about those issues.'' Mendez, according to Bloss, asked what Bloss meant? Bloss explained that Operations Supervisor Hilton had heard Mendez telling Union Shop Steward Cozzette that he was a preferred casual and was upset because Respondent was ''abusing [him] and not using [him] when they should,'' and that Hilton had overheard Mendez say that he intended to file a grievance about the matter. Bloss further testified that he advised Mendez it was Mendez' right to file a grievance, but that before he did he should check with somebody else or the contract, and explained to Mendez that under the terms of the contract he was not even close to being a preferred casual because he had worked only 40-odd days during the relevant period of time and did not know why Cozzette was advising him that he was a preferred casual, and further advised Mendez to talk to someone other than Cozzette or read the collective-bargaining contract himself. Bloss went on to tell Mendez, according to Bloss' testimony, that in the past Cozzette had given misinformation to other employees about the terms of the contract, and that Mendez should first get the Respondent's side of an issue before becoming upset.

Bloss denied saying anything about Mendez associating with the wrong people or that doing so would adversely affect his employment, or words to that effect, and also denied commenting to the effect that Respondent would decide who it was going to hire or that the Union was not going to dictate who was going to be hired.

As set forth above, Mendez' and Bloss' testimony about the March 6 interview differs substantially. I have credited Mendez' above-described testimony because his testimonial demeanor was good, whereas Bloss' was poor when they testified about the interview.

Shortly after his March 6 interview, Mendez spoke to Lawrence Holland, a regular truckdriver employed at the terminal, who had taken McLin's place as the Union's head shop steward. Mendez told Holland that Bloss had informed him that he would not be hired because he had been observed ''talking to the troublemakers and had an attitude.'' Mendez also informed Holland that it was his understanding that Respondent had to add another regular employee to its seniority roster and that since he had worked 42 shifts for Respondent, Mendez wanted to know where he stood with respect to being hired for that position. Holland, who, mistakenly thought that having worked 42 shifts Mendez was entitled to preferential hire, told Mendez he would speak to Bloss about the matter.

Almost immediately thereafter, Holland spoke to Bloss and told him he understood Respondent had lost a grievance and because of this had to hire another person. Bloss denied having lost a grievance, but conceded Respondent had agreed to hire another person. Holland then told Bloss it had been brought to his attention that Mendez had worked 42 shifts and that in view of this Holland thought Mendez should be considered for preferential hire. Bloss replied Mendez had no seniority with the Company and Bloss was not, as Holland suggested, obligated to hire him as a preferential casual. Bloss then declared that Mendez had been seen talking to ''some of the negative people and that he was not about to hire him,'' and explained to Holland it was his intent to ''go through the motions'' of interviewing Mendez along with other applicants, but would not hire Mendez ''because he was seen talking to the negative people, the troublemakers, the shit disturbers.'' Holland responded by repeating that Mendez had worked 42 shifts and in view of this would be considered a preferential casual. Bloss repeated all of his above-described comments and, in addition, stated it had been brought to his attention that Mendez was overheard saying that if he was not hired, he intended to file a grievance. The conversation ended at this point with Holland stating, ''you gotta do what you gotta do and Mendez has got to do what Mendez got to do.''

The above-description of Holland's conversation with Bloss is based on Holland's testimony. Bloss gave a completely different account of the conversation. He testified Holland came to him shortly before Mendez' March 6 interview and they ''talked about the hire and that [Respondent] was running behind,'' and that Bloss told Holland that ''we're going to push it through. We're going to get it done right now,'' and stated he had scheduled an interview with Mendez, whereupon, according to Bloss, ''[Holland] told me that Mendez had gotten caught up with the Ray Cozzette ring, it was affecting his attitude and his work [and] that he was a problem employee and it would be a big mistake if Yellow Freight hired this man.'' I rejected Bloss' testimony and credited Holland's because Holland's testimonial demeanor was good, whereas Bloss' was poor when he gave this testimony.

On March 8, 1992, Bloss testified he interviewed John Giorlando for the open position of regular employee on Respondent's seniority roster. Giorlando was a casual truckdriver, who, like Mendez, had been working as a casual truckdriver for Respondent.

Bloss testified he decided to hire Giorlando, instead of Mendez, to fill the open position on the seniority roster. He testified he made that decision within a week of Giorlando's March 8 interview. The record reveals that Giorlando was in fact added as a regular employee to Respondent's seniority roster on April 1, 1992, and that he filled out and was given all of the required preemployment forms and pamphlets on or about March 13, 1992, and took his physical exam on March 16, 1992, and his background investigation was completed on March 17, 1992.

2. Discussion and conclusions

(a) *Bloss threatens not to hire Mendez*

The complaint, as amended at the hearing, alleges that Terminal Manager Bloss, during the March 6, 1992 employment interview of Mendez, threatened not to hire employees who engaged in union or other protected concerted activities. As I have found, supra, in support of this allegation, Mendez credibly testified that during the March 6 employment interview, Bloss stated Mendez should be careful who he was seen talking to and warned him that if he was seen talking to the ''wrong people,'' he would never be hired to work at Respondent's South San Francisco terminal.

Previously, during the interview, Bloss asked Mendez what he thought about the Union and stated he was tired of the way the Union interpreted the parties' collective-bargaining contract. Then, later during the interview, Bloss remarked that Mendez was falling out of favor with Respondent's supervisors because of his grievances charging the supervisors with bypassing him for casual work. Also, as described in detail supra, early in 1992, prior to the March 6 interview, Mendez spoke to Union Shop Steward Cozzette on several different occasions about his employment-related grievances, including his complaint that Respondent's supervisors were bypassing him for casual work. It is also undisputed that Cozzette, whom Bloss regarded as a ''troublemaker'' because of the way he performed his duties as union shop steward, spoke to Respondent's supervisors about Mendez' grievances, on Mendez' behalf, including the one concerning Mendez' complaint that he was being bypassed for casual work.

It is clear, when viewed in the context of the above-described circumstances, that Bloss' above-described warning to Mendez constituted a none-too-subtle threat that if Mendez continued to talk with Union Shop Steward Cozzette about his employment-related grievances, Mendez would not be hired by Bloss as a regular employee. It is also clear, when viewed in the context of the above-described circumstances, that the warning was reasonably calculated to be so understood by Mendez. I, therefore, find that on March 6, 1992, in violation of Section 8(a)(1) of the Act, Respondent threatened Mendez that he would never be hired as a reg-

ular employee if he was seen talking with his union shop steward.

(b) *Bloss questions Mendez about his union sentiments*

The complaint alleges that during Terminal Manager Bloss' March 6, 1992 employment interview of Mendez, Bloss interrogated Mendez about his union and/or protected concerted activities. As I have found, supra, in support of this allegation, Mendez credibly testified that during the March 6 employment interview, Bloss asked Mendez what he thought about the Union and Mendez, who was a member of the Union, answered he was a union member and his reason for being a member was that he could not get the job he was applying for without being a member. I am of the opinion that the factors set forth hereinafter warrant a finding that when Bloss asked Mendez what he thought of the Union, his conduct violated Section 8(a)(1) of the Act.

Initially, I note that the interrogation occurred during Mendez' employment interview. ''The Board has long recognized that, under the totality of the circumstances test, an applicant may understandably fear that any answer he might give to questions about union sentiments posed in a job interview may well affect his job prospects.'' *Active Transportation*, 296 NLRB 431 fn. 3 (1989).

Second, Mendez was interrogated by the Respondent's highest ranking official employed at the South San Francisco terminal and was interrogated in that official's private office.

Third, at the same time he asked Mendez what he thought of the Union, Bloss told Mendez that he was tired of the way in which the Union was interpreting the parties' collective-bargaining contract and, as I have also found, supra, violated Section 8(a)(1) of the Act, by threatening that Mendez would never be hired by Bloss as a regular employee if he was seen talking with his union shop steward.

Considering all of the circumstances, I find that Respondent's March 6, 1992 interrogation of Mendez about his union sentiments had a reasonable tendency to interfere with, restrain, and coerce him in the exercise of his rights guaranteed by Section 7 of the Act. It is for this reason that I find that the interrogation violated Section 8(a)(1) of the Act.

(c) *Bloss admits he did not intend to hire Mendez*

The complaint, as amended at the hearing, alleges that early in March 1992 Bloss told employees that an employee would not be hired because he engaged in union or other protected concerted activities. As I have found, supra, in support of this allegation, employee Lawrence Holland testified that early in March 1992, when Holland, as the union's chief shop steward, questioned Bloss on Mendez' behalf about Mendez' employment as a regular employee, Bloss responded by stating he intended to just go through the motions of interviewing Mendez and not hire him, and explained to Holland he did not intend to hire Mendez, ''because he was seen talking to the negative people, the troublemakers, the shit disturbers,'' and further stated that Mendez had also been overheard saying that if he was not hired, he intended to file a grievance.

When viewed in context, as set forth in the previous section of this decision dealing with Bloss' March 6 threat not to hire Mendez if he was seen talking to his union shop steward, it is clear that in using the terms ''negative people,'' ''troublemakers,'' and ''shit disturbers,'' when explaining to Holland why he did not intend to hire Mendez, that Bloss was referring to Union Shop Steward Cozzette and the fact that Mendez had sought Cozzette's advice and assistance in connection with his employment-related grievances. Under the circumstances, Bloss' statement to Holland that he did not intend to hire Mendez because he was observed talking to ''negative people,'' ''troublemakers,'' and ''shit disturbers,'' constitutes an admission by Bloss that he did not intend to hire Mendez because he had sought the advice and assistance of Union Shop Steward Cozzette. I further find that Bloss' statement tended to interfere with Holland's statutory rights because even though the statement did not refer to Cozzette by name or position, it was phrased in such a manner as to lead Holland to reasonably believe that Bloss was speaking about Union Shop Steward Cozzette.[6] I therefore find that Respondent violated Section 8(a)(1) of the Act when, early in March 1992, it implicitly told employee Holland that it did not intend to hire Mendez because he was observed speaking to the union shop steward.

(d) *Bloss hires Giorlando instead of Mendez*

On April 1, 1992, Respondent's South San Francisco terminal added one more regular employee to its seniority roster. The employee whose name was added to the list was John Giorlando, who, like Charging Party Mendez, had been previously employed on an intermittent basis at the terminal as a casual employee. It was Terminal Manager Bloss who selected Giorlando, rather than Mendez, to be the one added to the seniority roster of regular employees.

The complaint alleges that Respondent refused to hire Mendez on April 1, 1992, because of his union or protected activities, in violation of Section 8(a)(1) and (3) of the Act. I find, for the reasons set forth hereinafter, that the record as a whole establishes that a motivating factor for Bloss' decision to hire Giorlando, rather than Mendez, was Respondent's animosity toward Mendez because he had sought the advice and assistance of his union shop steward concerning his employment-related grievances. I also find, for the reasons set forth hereinafter, that Respondent failed to establish it would have hired Giorlando, instead of Mendez, on April 1, 1992, even if Mendez had not sought the advice and assistance of his union shop steward. It is for these reasons that I further find that Respondent, as alleged in the complaint, violated Section 8(a)(1) and (3) of the Act when, on April 1, 1992, it failed and refused to hire Mendez as a regular employee.

As I have found supra, in the fall of 1991, Respondent responded to the Union's demand that it add several more employees to its seniority roster of regular employees, by agreeing to add two more employees. The two casuals whom Respondent agreed to add to the seniority roster were Cromartie and Mendez: Cromartie, because under the terms of the collective-bargaining agreement it was required to add Cromartie, if it added anyone to the list, because he had

[6] I note the record establishes that not only did Bloss believe Cozzette was a ''troublemaker'' because of the way in which he conducted himself as union shop steward, but it also establishes that Bloss publicly called Cozzette a ''troublemaker'' for this reason and Holland was one of the employees who Bloss had previously publicly expressed this opinion to.

worked a sufficient number of hours to be classified as a preferred casual; and Mendez, instead of Giorlando, because Respondent in evaluating them had concluded Mendez was the better or superior employee (see Tr. 496). Respondent selected Mendez over Giorlando even though Mendez had only commenced work at the Respondent's South San Francisco terminal on August 9, 1991, after a lapse of almost 3 years, whereas Giorlando had been working intermittently there as a casual since mid-September 1989. Nevertheless, it was Mendez, rather than Giorlando, whom Respondent in the fall of 1991 selected to add to its seniority roster of regular employees and, consistent with that decision, Respondent in the last week of October 1991 and the first week of November 1991 took all of the necessary steps preliminary to hiring Mendez as a regular employee; it had him read and/or fill out all of the documents necessary for his employment as a regular employee; it had him take a physical examination and a drug/alcohol test; and it completed an investigation of his background. However, on November 4, 1991, the union officially placed Respondent on notice that it did not agree that Respondent's contractual obligation would be satisfied by the addition of only Cromartie and Mendez to its seniority roster. Rather, in the grievance it filed on that date, the union alleged Respondent was contractual obligated to add six more names to its seniority roster of regular employees. Respondent responded by taking the position that it was only contractually obligated to add one more name to the list, Cromartie's name. Respondent also at this time postponed adding Mendez' name to the list and, through Operations Manager Graybill, advised Mendez of this decision. Graybill, in early November 1991, advised Mendez that his hire as a regular employee was being postponed, but that in the interim Graybill would treat him as if he were a preferred casual and ask the Union's hiring hall to refer him for casual work ahead of the other casuals. Thereafter, in mid-February 1992 representatives of the Respondent and Union settled the Union's grievance by agreeing that Respondent would add one employee to its seniority roster of regular employees by April 1, 1992. The casual added to this list on April 1, 1992, was Giorlando, not Mendez.

In summation, only 5 months prior to its April 1, 1992, hire of Giorlando, instead of Mendez, Respondent, after evaluating their relative performances, had decided Mendez was the superior employee and because of this decided he would be the one added to its seniority roster of regular employees. Thus, the question for decision is what occurred in the interim that caused Respondent to change its mind and hire Giorlando instead of Mendez. In this regard, as described in detail, supra, and briefly summarized infra, the record establishes that Mendez on several different occasions, during the interim, sought the advice and assistance of Union Shop Steward Cozzette about employment-related-complaints, and that Cozzette, on behalf of Mendez, spoke to Respondent's officials about Mendez' complaints, and that Respondent's officials were hostile toward him for seeking the advice and assistance of Union Shop Steward Cozzette.

As described in more detail, supra, Union Shop Steward Cozzette spoke to Respondent's representatives on Mendez' behalf, as follows: Mendez complained to Operations Manager Graybill and Operations Supervisor Hilton in late December 1991 or January 1992 that Respondent was not calling him for the available casual work, despite Graybill's promise to treat him as if he was a preferred casual; Mendez brought this complaint to the attention of Cozzette on more than one occasion, and Cozzette, in approximately February 1992, spoke to Graybill and asked him why Respondent was working around Mendez and using other casuals; Mendez complained to Cozzette in February 1992 that in requesting the Union to refer him for casual work, Respondent was specifying he be referred to the 9 a.m. work shift, rather than for the earlier and more desirable 8 a.m. work shift; Cozzette went to Operations Manager Graybill and asked why Mendez was being called to work on the late shift so often, as he told Graybill it meant Mendez would be stuck in the heavy commuter traffic while making deliveries; Mendez in February 1992 complained to Cozzette that Respondent, while asking the Union to refer him as a heavy-duty truckdriver was in fact employing him as a bobtail truckdriver, which is a more onerous job than driving a heavy-duty truck; and Cozzette spoke to Graybill and asked him why Respondent was doing this to Mendez.

Also late in 1991 or early in 1992, Mendez, after complaining about the matter to Operations Supervisor Johnston, complained to Union Shop Steward Cozzette that Johnston had bypassed him on one occasion for overtime work and had told him it was perfectly within the Company's right to do this because the Company could assign overtime to casuals on a first-come-first-serve basis. Cozzette told Mendez he would investigate the matter and if he discovered that Respondent was not following the collective-bargaining contract he would file a grievance. It is undisputed that Operations Supervisor Hilton overheard this conversation.

It is also undisputed that on the day before Mendez' March 6 employment interview by Terminal Manager Bloss, Operations Manager Hilton informed Bloss that Cozzette had advised Mendez it was not necessary for Mendez to be interviewed by Bloss in order to be added to the Respondent's seniority roster. Hilton also told Bloss that he had overheard that Mendez had indicated he intended to listen to Cozzette's advice.

The evidence of Respondent's hostility toward Mendez because he sought Union Shop Steward Cozzette's advice and assistance has been set forth in detail, supra, and may be briefly summarized as follows: in February 1992, Operations Supervisor Hilton informed Terminal Manager Bloss that Mendez had developed ''an attitude problem'' and explained to Bloss that the reason for Mendez' ''attitude problem'' was that Mendez had been receiving misinformation from Union Shop Steward Cozzette concerning the collective-bargaining contract and, in this respect, specifically told Bloss that Mendez had received misinformation from Cozzette about Mendez' above-described overtime complaint and about his above-described complaint of being assigned to drive a bobtail truck rather than a heavy-duty truck; Bloss was unhappy to learn from Supervisor Hilton that Mendez, based on information received from Cozzette, had been complaining about his terms and conditions of employment; Bloss' unhappiness stemmed from Bloss' belief that Cozzette abuses his position as a union shop steward by giving misinformation to employees; Bloss also believes that Cozzette is a ''troublemaker'' and has publicly called him this name because Bloss feels that Cozzette is over zealous and unreasonable in the manner in which he exercises his duties as a union shop steward; during Mendez' March 6, 1992 employment inter-

view, Bloss mentioned to Mendez that he had heard Mendez had a problem involving overtime work with Operations Supervisor Johnston and stated Mendez was falling out of favor with Respondent's operations supervisors because he was filing grievances charging the supervisors with bypassing him for work; during the March 6, 1992 employment interview, as I have found, supra, Respondent violated Section 8(a)(1) of the Act when Bloss implicitly stated that Mendez would never be hired as a regular employee if he was seen talking with his union shop steward; early in March 1992, as I have found, supra, Bloss admitted to the Union's chief shop steward, Holland, that because Mendez had sought the advice and assistance of his union shop steward, that Bloss did not intend to hire him as a regular employee, but intended just to go through the motions of interviewing him; and, during the same conversation, as I have found, supra, Respondent violated Section 8(a)(1) of the Act when Bloss implicitly stated that he did not intend to hire Mendez because he was observed speaking to the union shop steward.

In summation: in November 1991 only 4-1/2 months before Respondent's March 1992 decision to hire Giorlando as a regular employee, Respondent had been ready to hire Mendez, instead of Giorlando, as a regular employee, because it considered Mendez to be the superior applicant for the position; in the interim, between November 1991 and Respondent's March 1992 decision, Mendez sought the assistance and advice of Union Shop Steward Cozzette about several complaints relating to Mendez' terms and conditions of employment, and Cozzette, on Mendez' behalf, spoke to Respondent's management about his complaints; Bloss, the manager of the Respondent's South San Francisco terminal, who made the March 1992 decision to hire Giorlando, instead of Mendez, was unhappy that Mendez had sought Cozzette's assistance and advice about his complaints, because Bloss believes that Cozzette, whom he considers to be a ''troublemaker,'' performs his duty as a union shop steward in an over zealous and unreasonable manner; during Mendez' March 6, 1992 employment interview, Bloss manifested his animus toward Mendez for having sought Cozzette's advice and assistance, by implicitly warning Mendez, in violation of Section 8(a)(1) of the Act, that Mendez would never be hired as a regular employee if he was seen talking with his union shop steward, and by stating to Mendez that he had fallen out of favor with the Company's supervisors because he was filing grievances charging that the supervisors were bypassing him for work; and, shortly thereafter, in violation of Section 8(a)(1) of the Act, Bloss implicitly admitted to Union Chief Shop Steward Holland that because Mendez had sought the advice and assistance of his shop steward that Bloss did not intend to hire him as a regular employee and was just going through the motions in interviewing Mendez for that position. The foregoing factors, considered in their totality, establish that a motivating factor in Bloss' March 1992 decision to hire Giorlando, instead of Mendez, to fill the April 1, 1992 job vacancy was Bloss' animosity toward Mendez for having sought the advice and assistance of Union Shop Steward Cozzette in connection with several of Mendez' complaints concerning his terms and conditions of employment.

Having concluded that Manager Bloss' animosity toward Mendez because he sought the advice and assistance of Union Shop Steward Cozzette about his terms and conditions of employment was a motivating factor in Bloss' decision to hire Giorlando, rather than Mendez, to fill the April 1, 1992 job vacancy, and because Mendez was engaged in the type of conduct protected by Section 7 of the Act when he asked for Cozzette's advice and assistance, the remaining question is whether Respondent has established that even if Mendez had not sought the advice and assistance of Union Shop Steward Cozzette, Bloss would still have selected Giorlando, rather than Mendez, to fill the April 1 job vacancy, or whether, in any event, even if Bloss had selected Mendez to fill that position, the Respondent's human relations department (HRD) would have vetoed Bloss' selection because of Mendez' record of traffic violations. The evidence pertinent to Respondent's aforesaid defenses is set forth and evaluated hereinafter.

Bloss would have selected Giorlando, instead of Mendez, even if Mendez had not sought the advice and assistance of his union shop steward

Bloss testified that while he made the decision in mid-March 1992 to hire Giorlando to fill the April 1, 1992 job opening, that he received ''general input'' from Operations Manager Graybill and Operations Supervisors Johnston and Hilton, which helped him reach his decision. The reason he asked these supervisors for their recommendations, Bloss testified, was that he was not familiar with the employees' work performance, that as a matter of fact he had never even previously spoken to Mendez or Giorlando because the supervision of the terminal's employees is left to Operations Manager Graybill and the operations supervisors.

Besides relying on the recommendations of Operations Manager Graybill and Supervisors Johnston and Hilton in reaching his decision to hire Giorlando, instead of Mendez, Bloss testified he also relied on the fact that the production or performance records maintained by Respondent showed that for the 4-month period prior to March 1992 Giorlando's productivity or work performance, as measured by Respondent's standards, had been better than Mendez'.

Bloss further testified his decision to hire Giorlando was also influenced by the good impression Giorlando made on Bloss during his March 8, 1992 employment interview. In this regard, Bloss testified he was favorably impressed by the following information he received from Giorlando during the interview: Giorlando, in order to work for Respondent at its South San Francisco terminal, drove all the way from Sacramento, where his home was located, a drive of approximately 1-1/2 hours each way; Giorlando has a family of five children, including an infant; Giorlando was 60 years old, with many years of experience in the trucking industry; and Giorlando told him that he wanted the job with Respondent in the worst possible way.

As I have indicated previously in this decision, Bloss' testimonial demeanor was generally poor when he testified in connection with the allegations charging Respondent with unlawfully failing and refusing to hire Giorlando. This was true when he gave his above-described testimony justifying his hire of Giorlando, instead of Mendez. In view of Bloss' poor testimonial demeanor, when he gave this testimony, it was essential that Respondent corroborate Bloss' above-described testimony, in at least some respects. However, as set forth in detail, infra, his above-described testimony is com-

pletely without corroboration, even though it was susceptible of corroboration in virtually all respects.

Giorlando was not called to corroborate Bloss' testimony about his interview of Giorlando. But of more significance is Respondent's failure to corroborate Bloss' testimony by: producing the company records, which Bloss testified he relied on to conclude that Giorlando's production or work performance record was better than Mendez'; by failing to call as witnesses Operations Supervisors Hilton and Johnston, whose recommendations Bloss testified influenced his decision to hire Giorlando, instead of Mendez; and by the failure of Operations Manager Graybill to corroborate Bloss' testimony. In this last regard, the testimony of Graybill contradicted Bloss' testimony that Graybill indicated he was opposed to Respondent's hiring Mendez to fill the April 1 job opening. Bloss testified that when he asked Graybill who he thought should be hired to fill that position, Graybill told Bloss he was ''having some doubts on Mendez,'' whereas Graybill testified that when Bloss asked him who he would recommend to fill that job opening, Graybill simply replied, ''Mendez and Giorlando.'' Graybill further testified that he had no recollection of giving Bloss any recommendation as to which of the two Bloss should hire.[7]

Respondent offered no explanation for its failure to place into evidence the production or performance records supposedly relied on by Bloss or for the failure of Graybill, Hilton, and Johnston to corroborate Bloss' testimony that they in effect indicated to Bloss that he should fill the April 1 job opening with Giorlando, rather than Mendez.[8] These circumstances warrant the inference that the testimony of Graybill, Johnston, and Hilton would not have corroborated Bloss' and would have been adverse to the Respondent. Likewise, the same inference is warranted by Respondent's failure to place into evidence the records supposedly relied on by Bloss in evaluating Mendez' and Giorlando's work performance.

I also am of the opinion that there are certain portions of Bloss' testimony which tend to reinforce the General Counsel's case. As I have indicated previously, Bloss testified that when Operations Supervisor Hilton recommended that Bloss hire Giorlando, rather than Mendez, Hilton explained to Bloss that a significant reason for his recommendation was that Mendez had developed ''an attitude problem.'' In this regard, according to Bloss' testimony, Hilton told Bloss that as the result of information Mendez had gotten from Union Shop Steward Cozzette, Mendez had been complaining to supervision about his failure to receive overtime work and being assigned to drive bobtail, rather than heavy-duty trucks. Similarly, according to Bloss' testimony, when Johnston recommended that Giorlando be hired, instead of Mendez, the only reason Johnston gave to Bloss for his recommendation was that he did not understand why Mendez had recently complained to him about not receiving the overtime work which Johnston had assigned to another driver. As described in detail supra, Mendez spoke to Union Shop Steward Cozzette about this complaint and Cozzette informed Mendez that he would file a contractual grievance on Mendez' behalf, if Cozzette discovered that Johnston had acted improperly. This conversation between Mendez and Cozzette was overheard by Operations Supervisor Hilton, who apparently informed Bloss about it.

Also significant in evaluating Bloss' testimony that based on what Mendez and Giorlando said to him during their March 1992 interviews, he was more favorably impressed by Giorlando, is the fact that virtually all of the information which Giorlando allegedly communicated to Bloss during the interview, which supposedly favorably impressed Bloss, should have been readily available to Bloss 4-1/2 months earlier, when Respondent decided to hire Mendez rather than Giorlando. In other words, what supposedly impressed Bloss about Giorlando in early March 1992, obviously did not impress him as much 4-1/2 months earlier. In fact the record establishes that when, in 1991, Respondent decided Mendez was better qualified for a job as a regular employee than Giorlando, Mendez was not interviewed by Bloss before Respondent reached its decision. Nor is there evidence that Bloss interviewed Giorlando at that time in order to determine whether or not he was the most qualified applicant. Bloss did not explain why in March 1992 he felt it necessary to interview applicants Mendez and Giorlando for the April 1 job opening, whereas 4-1/2 months earlier interviews had not been necessary.

Considering that a large part of Bloss' interview with Mendez consisted of Bloss' criticism of Mendez for having sought the assistance and advice of his union shop steward, and considering Bloss' admission to Holland that Bloss did not intend to hire Mendez as a regular employee, but just intended to give the appearance of considering him for the position by interviewing him; I am of the view that the unexplained failure of Bloss to interview Mendez and Giorlando 4-1/2 months earlier, when Respondent decided that Mendez was the better qualified applicant, makes highly suspect Bloss' testimony about his interview with Giorlando and tends to buttress the General Counsel's case.

In summation, Bloss' poor testimonial demeanor when he testified about his reasons for selecting Giorlando, instead of Mendez, to fill the April 1, 1992 job opening, and the lack of corroboration for even one portion of that testimony, even though corroboration should have been easy to accomplish, has led me to reject his testimony on this subject in its entirety.

[7] I note, however, there are indications in the record that by mid-February 1992 Graybill had reached the conclusion that Giorlando was the better candidate for the April 1 job opening because Giorlando never complained to supervisors about his terms and conditions of employment, whereas Mendez not only had been making such complaints, but had gone to his union shop steward with his complaints. This inference is warranted by Graybill's testimony that by March 1992, he had decided Giorlando was a better applicant than Mendez to fill the April 1 job opening, because Giorlando just did his work without complaining to supervision about his terms and conditions of employment, whereas Mendez had recently began to complain to supervisors about being assigned to work on the 9 a.m. rather than the 8 a.m. work shift and about being assigned to drive a bobtail truck rather than a heavy-duty truck, and by the fact, as described, supra, Union Shop Steward Cozzette, on Mendez' behalf, had brought those complaints to Graybill's attention and asked Graybill to remedy them.

[8] The record establishes that Graybill, Hilton, and Johnston, who were employed by Respondent at the time of the hearing herein, are supervisors within the meaning of Sec. 2(11) of the Act and agents of Respondent.

Even if Bloss had selected Mendez to fill the April 1 job opening, he would not have been permitted by the Respondent's human resources department to hire Mendez because of Mendez' record of moving traffic violations

As I have found, supra, in the fall of 1991, in response to the Union's claim that Respondent was contractually obligated to add several more regular employees to its seniority roster, the Respondent agreed to add two names to its seniority roster and selected casuals Cromartie and Mendez. In connection with its decision to add Cromartie's and Mendez' names to its seniority roster, Respondent transmitted the necessary paperwork to the office of the Respondent's regional human resources department (HRD), located in Tracy, California, for that office's approval. The Tracy HRD is responsible, among other things, for processing the paperwork associated with the hire of employees by Respondent's facilities located throughout the northwestern part of the United States.

As previously described, one of the documents Mendez was required to fill out and submit to the Respondent in the fall of 1991, in connection with his application for employment as a regular employee, was a ''Motor Vehicle Driver's Certification,'' which asked him to list each traffic violation for which he had been convicted during the last 5 years. Mendez wrote he had been convicted of four moving traffic violations during the 5-year period, on the following dates: January 5, 1989; February 6, 1989; May 27, 1990; and August 21, 1990.[9] On October 25, 1991, Mendez submitted the certification to Respondent's operations supervisor, Graybill, who submitted it to the Tracy HRD, with the other paperwork connected with Mendez' application for employment as a regular employee.

It is Respondent's position that in view of Mendez' above-described record of moving traffic violations, Respondent, pursuant to a company policy which had been in existence since April 24, 1990, was required to reject his application for employment and that it did so in November 1991, and would have done so again in March 1992, even if Bloss had selected Mendez, instead of Giorlando, to fill the April 1, 1992 job opening. The sole evidence presented by Respondent in support of this contention is the testimony of Mark Kilpatrick, who, since 1989, has been the manager of Respondent's Tracy region HRD. Kilpatrick's testimony is set forth and evaluated hereinafter.

Kilpatrick testified he would not have permitted Bloss to hire Mendez to fill the April 1 vacancy because the two remaining moving traffic violations on Mendez' record would have required Kilpatrick to reject his application pursuant to the policy set forth in the memo dated April 24, 1990 addressed to all of Respondent's ''Regional,'' ''Breakbulk'' and ''Branch'' managers, from Respondent's vice president of human resources, Philip Parkey, on the subject of ''Driver Requirements.'' The April 24, 1990 memo reads as follows:

> Effective immediately, three key requirements for road drivers, city drivers, and combination men have been changed. Use these requirements when you screen applicants for driver positions:
>
> *Age*: At least 23 years old for road drivers. At least 21 years old for city drivers and combination men.
>
> *Experience*: A minimum of one year's driving experience with the same type of equipment as YFS's or graduation from YFS's Driver Training Program or from another YFS-approved program.
>
> *Driving Record*: Record of safe and competent driving (personal and commercial), as shown on the state Motor Vehicle Record supplied by the applicant and as verified by former employers.
>
> *Reject* an applicant with any one of these records:
>
> – A chargeable accidence or driving under the influence (DUI) of alcohol or drugs in the last 36 months.
> – A moving violation in the last 12 months.
> – More than one moving violations in the last 13–24 months.
> – More than two moving violations in the last 25–36 months.
>
> Also *reject* an applicant for either of these reasons (DOT Commercial Driver's Standards, 49 CFR 383.51):
>
> – Two or more of these offenses while driving a commercial vehicle: DUI (alcohol or drugs), leaving an accident scene, or a non-drug felony.
> – One drug-related felony while driving a commercial vehicle.
>
> Applicants must meet these revised requirements, as well as the other current requirements you're familiar with—license, driving ability, and physical condition. If you have any questions about the driver requirements, please check with your Human Resource office or with KCGO Corporate Employment.

Kilpatrick testified that copies of this memo were sent to all of the Company's terminal managers on the date of the memo's issuance. He further testified that the driving record policy set forth in the memo has been applied by him to every applicant seeking a regular driving position with any of the terminals located within the region administered by the Tracy HRD and that he has rejected every applicant who has applied for a position as a regular employee whose driving record did not meet the criteria set forth in the April 24, 1990 memo.[10] Kilpatrick also testified that because Mendez had more than one moving traffic violation in the last 13–24 months, that Kilpatrick, pursuant to the company policies set forth in the April 24, 1990 memo, would have prevented Bloss from hiring Mendez to fill the April 1, 1992 vacancy, even if Bloss had selected Mendez to fill that position.

The actions of Terminal Manager Bloss contradict Kilpatrick's testimony that Mendez' driving record would have precluded Bloss from hiring Mendez to fill the April 1, 1992 vacancy. As early as October 25, 1991, when, as described above, Mendez submitted his motor vehicle driver's

[9] The state motor vehicle regulations provide that traffic violations are automatically removed from a driver's traffic record after 3 years, therefore, during the period from mid-February through April 1, 1992, Mendez would have had only two moving traffic violations on his record.

[10] I note that other than Kilpatrick's above-described conclusionary testimony, Respondent presented no evidence, documentary or otherwise, that Respondent has ever applied the driver requirements set forth in the April 24, 1990 memo, in the way it claims they would have been applied in this case if Bloss had selected Mendez to fill the April 1, 1992 vacancy.

certification to Respondent's South San Francisco terminal, Bloss must have known that Mendez had more than one moving violation in the last 13–24 months. Yet, despite this knowledge, it is undisputed that Bloss went ahead and considered Mendez as one of the two eligible candidates to fill the April 1, 1992 job opening and on March 6, 1992, interviewed him for that position and subsequently, in selecting Giorlando, instead of Mendez, did not rely on Mendez' record of traffic violations in reaching that decision.

Respondent in its posthearing brief argues that the reason for Bloss' above-described conduct was that he was either ignorant of the April 24, 1990 memo or misinterpreted it. However, I will not consider this post hoc rationalization for Bloss' conduct. Bloss, a witness for Respondent, did not explain why at all times material to this case he completely disregarded Mendez' two moving traffic violations, when considering whether or not to hire Mendez to fill the April 1 job vacancy.[11]

The actions of Operations Manager Graybill also contradict Kilpatrick's testimony that Mendez' driving record would have precluded him from being hired to fill the April 1, 1992 vacancy. It is undisputed, as described supra, that in November 1991 Graybill told Mendez that due to Mendez' ''driving record'' his hire by Respondent would have to be postponed until sometime after January 1992, when two of his four traffic citations would have been removed from his driving record. It is also undisputed, as described supra, when Union Shop Steward McLin asked Graybill in January 1992 why Mendez' name had not been added to the seniority roster, Graybill responded by stating that Mendez had one or two traffic citations that were supposed to be removed from his record in the immediate future and that when that occurred Respondent would consider adding his name to the seniority roster. Also, as I have found supra, during the period from late January 1992 through mid-February 1992, on more than one occasion, when Union Shop Steward Cozzette asked Graybill why Mendez had not been hired, Graybill replied that the reason for this was that Mendez' paperwork had not come back from Respondent's general office and, in the last one of these conversations, Graybill told Cozzette that the reason Mendez had not been hired was because he had failed to pass his drug test.

If, as Kilpatrick testified, Respondent interpreted the contents of the April 24, 1990 memo to preclude Mendez' hire as a regular employee until May 28, 1992, I am convinced that Graybill, when asked by Mendez, McLin, and Cozzette why Mendez had not been hired as a regular employee, would have explained this to them. Graybill, who testified for Respondent, did not explain why, if Respondent interprets the memo in the manner in which Kilpatrick testified, Graybill failed to explain this to the persons who questioned him about Respondent's failure to hire Mendez. I recognize that Graybill did indicate to Mendez and McLin that Mendez' driving record was the reason Respondent had postponed hiring him, but rather than state that pursuant to company policy Respondent's consideration of his hire as a regular employee would have to be postponed until after May 28, 1992, because of his driving record, Graybill indicated to them it would be postponed only until two of his four traffic violations had been removed from his record, which under the company policy set forth in the April 24, 1990 memo, as interpreted by Graybill, would have meant that Mendez would have been eligible for hire as early as February 7, 1992.

In evaluating Kilpatrick's testimony that if Mendez had been selected by Bloss to fill the April 1, 1992 job opening, Kilpatrick would have vetoed the selection because of Mendez' traffic citations, I considered his further testimony that in November 1991, after his office reviewed the paperwork submitted by Terminal Manager Bloss seeking the HRD's approval of Bloss' decision to hire Mendez, that the HRD office rejected Mendez' application because of his traffic citations and notified Operations Supervisor Graybill of its decision. More specifically, Kilpatrick testified that his assistant, Mary Yelton, notified Graybill that the HRD had disapproved Mendez' application because of his traffic violations. Initially, Kilpatrick testified that in November 1991, Yelton told him she had notified Graybill that Mendez did not comply with Respondent's requirement for drivers because of his traffic violations. Later, however, at another point in his testimony, Kilpatrick now testified that his knowledge of what Yelton said to Graybill on this subject was not based on what Yelton told Kilpatrick, but it was based on a note in Yelton's handwriting which appears on the paperwork submitted to the HRD in the first week of November 1991, concerning Mendez' employment. This notation does not, however, state Yelton had notified Graybill that Mendez did not comply with Respondent's requirements for drivers because of his traffic violations, rather it states: ''11/14 need to talk to Mark Graybill on MVR I have concern.'' Subsequently, at another point in his testimony, Kilpatrick testified that it is the above-described notation, in Yelton's handwriting, which leads him to believe that Yelton ''may have called Graybill'' and spoken to him about Mendez' driving record. Yelton, Kilpatrick's assistant, was not called by Respondent to corroborate Kilpatrick's testimony and Graybill flatly contradicted his testimony. Graybill testified that in November 1991 Mendez' hire as a regular employee was contingent on the HRD's approval, but when asked, ''Did you ever get a decision from the [HRD],'' testified, ''No.'' As to any conversation he might have had with Yelton on that subject, Graybill testified his only conversation with her was when, in early November, he telephoned Yelton and told her to stop processing Mendez' application because the terminal did not intend to hire anyone, and Yelton's only response was to say, ''Okay, that's fine,'' and this ended the conversation.

Considering Kilpatrick's poor testimonial demeanor; considering his above-described contradictory testimony; considering the failure of Respondent to call Kilpatrick's assistant, Mary Yelton, to corroborate his above testimony; and considering that his testimony was contradicted by Graybill, I find that Respondent has failed to establish that the HRD ever rejected Mendez' employment application because he had an excessive number of moving traffic violations. I recognize that in November 1991 Graybill notified Mendez that due to Mendez' driving record his employment by Respondent as a

[11] I reject Respondent's suggestion that since Bloss did not become the manager of the South San Francisco terminal until February 1991, he perhaps was not aware of the contents of the April 24, 1990 memo. I will not make the preposterous assumption that Respondent's terminal managers are only expected to be familiar with the Company's employment policies which are instituted after they become terminal managers.

regular employee would have to be postponed until sometime after January 1992, when, as Graybill explained to Mendez, two of Mendez' four traffic citations would have been removed from his driving record. Graybill, when he testified for Respondent during the hearing in this case, failed to explain the basis for the aforesaid remarks he made to Mendez, which he did not deny making. This warrants the inference that Graybill believed that pursuant to Respondent's drivers' requirement policy, Mendez was eligible for employment on or about February 6, 1992, after two of his four traffic violations had been removed from his record.

Also relevant in evaluating Kilpatrick's testimony that he or his office would have rejected Mendez' employment application, even if Bloss had selected Mendez to fill the April 1, 1992 job opening, is the complete lack of corroboration for his testimony, as described below. Since Kilpatrick's testimonial demeanor—the tone of his voice, the way he spoke, looked, and acted when he testified—was poor, this lack of corroboration becomes even more meaningful in evaluating his testimony.

As I have noted previously, other than Kilpatrick's conclusionary testimony, which was devoid or any kind of specificity, Respondent presented no evidence, documentary, or otherwise, to establish that it has applied the driver requirements set forth in the April 24, 1990 memo in the way Kilpatrick claims they would have been applied, if Bloss had selected Mendez to fill the April 1, 1992 job vacancy. Likewise, Respondent failed to produce Kilpatrick's assistant, Mary Yelton, to corroborate his testimony, either in this respect or in other respects significant to this case. Nor were the only management officials who were called by Respondent to testify in this case—Bloss and Graybill—asked by Respondent to corroborate Kilpatrick's testimony that pursuant to the policy set forth in the April 24, 1990 memo, Bloss could not have hired Mendez to fill the April 1, 1992 job vacancy, even if Bloss had wanted to hire him for that vacancy. Quite the opposite, as described in detail, supra, Bloss' actions indicate that, so far as he was concerned, Mendez' traffic record was not an obstacle to his being hired to fill the April 1 vacancy. I am of the view that Respondent's unexplained failure to provide any of the above-described corroboration for Kilpatrick's testimony warrants the inference that if such evidence had been produced (documentary and/or testimonial) it would have contradicted Kilpatrick's testimony and been adverse to the Respondent's case.

To sum up, I find Respondent has failed to establish that even if Bloss had selected Mendez to fill the April 1, 1992 job vacancy, Mendez would not have been hired to fill the vacancy because Respondent's HRD would have rejected his application. This defense, as described supra, was based entirely on the testimony of Kilpatrick, which I have rejected because: his testimonial demeanor was poor; his testimony was completely without corroboration, even though corroboration should have been conveniently available; the failure of Respondent to produce corroborating evidence warrants the inference that such evidence (testimonial and/or documentary) would have contradicted Kilpatrick's testimony and been adverse to Respondent; and, the conduct of Terminal Manager Bloss and Terminal Operations Manager Graybill contradicted Kilpatrick's testimony.

Even assuming that the record as a whole warrants the finding that there is no certainty that if Bloss had selected Mendez to fill the April 1, 1992 vacancy, Respondent's HRD would have approved his application for the vacancy, in view of his two traffic violations, I find that this uncertainty must be resolved against Respondent as the wrongdoer who is responsible for the uncertainty. See *NLRB v. Remington Rand*, 94 F.2d 862, 872 (2d Cir. 1938); *Bigelow v. RKO Pictures*, 327 U.S. 251, 256 (1946) (''[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created''). For, here, as I have found supra, the record establishes that Bloss' failure to select Mendez to fill the April 1, 1992 vacancy was unlawfully motivated. Accordingly, it was Respondent's unlawful conduct which created the uncertainty herein.

Having found that Respondent's animosity toward Mendez, because Mendez sought the advice and assistance of Union Shop Steward Cozzette about his terms and conditions of employment, was a motivating factor in Respondent's failure and refusal to hire Mendez on April 1, 1992, and having further found Respondent failed to establish it would still not have hired Mendez on April 1, 1992, even if Mendez had not sought the advice and assistance of the union shop steward, I find Respondent violated Section 8(a)(1) and (3) of the Act when it failed to hire Mendez on April 1, 1992.

C. *Respondent's May 28, 1991 Refusal to Permit Union Representative Hart to Have Access to its Facility to Investigate Grievances (Case 20–CA–24053)*

1. The evidence

The Union has represented the truckdrivers and dockworkers employed at the Respondent's South San Francisco terminal since approximately 1977 and since then those employees' terms and conditions of employment have been governed by collective-bargaining agreements between Respondent and the Union. As described supra, during the time material, the terminal's employees were covered by the terms of the 1991–1994 National and Local Agreements.

The part of article 24 of the National Agreement entitled ''Inspection Privileges'' reads:

> Authorized agents of the Union shall have access to the Employer's establishment during working hours for the purpose of adjusting disputes, investigating working conditions, collection of dues, and ascertaining that the Agreement is being adhered to; *provided, however, there is no interruption of the firm's working schedule.* [Emphasis added.]

Section 9 of article 49 of the Local Agreement, entitled ''Inspection Privileges,'' contains the same language set forth above, except for the italicize proviso. However, the Local and National Agreements each provide, in substance, that wherever there is a difference in the language contained in the two agreements, the terms of the National Agreement shall prevail over the Local Agreement. Accordingly, I find that the Union's contractual right to access to the South San Francisco terminal is governed by the National, not the Local Agreement.

Article 8 of the National Agreement is entitled ''National Grievance Procedure'' and section 1 of that article provides that ''all grievances or questions of interpretation arising under this [National Agreement] . . . shall be processed as set forth below [referring to the contractual grievance-arbitration procedure ending in binding arbitration].''

Section 3 of article 8 of the National Agreement is entitled ''Work Stoppages'' and provides:

> (a) The parties agree that all grievances and questions of interpretation arising from the provisions of this Agreement shall be submitted to the grievance procedure for determination. Accordingly, except as specifically provided in other Articles of the National Master Freight Agreement, no work stoppage, slowdown, walk out or lockout shall be deemed to be permitted or authorized by this Agreement except . . . .

The National Agreement at this point in section 3 of article 8 goes on to enumerate the several exceptions to the above general prohibition against work stoppages, slowdowns, walkouts, or lockouts, none of which exceptions are applicable to this case, and then states the following:

> In the event of such unauthorized work stoppage . . . in violation of this Agreement, the Local Union shall immediately make every effort to persuade the employees to commence the full performance of their duties and shall immediately inform the employees that the work stoppage . . . is unauthorized in violation of this Agreement. The question of whether employees who refuse to work during such unauthorized work stoppages, in violation of this Agreement . . . shall be considered as participating in an unauthorized work stoppage in violation of this Agreement may be submitted to the grievance procedure, but not the amount of the suspension herein referred to.
>
> It is specifically understood and agreed that the Employer during the first 24 hour period of such unauthorized work stoppage in violation of this Agreement, shall have the sole and complete right of reasonable discipline, including suspension from employment, up to and including 30 days, but short of discharge, and such employees shall not be entitled to or have any recourse to the grievance procedure. In addition, it is agreed between the parties that if any employee repeats any such unauthorized strike, etc., in violation of this Agreement, during the term of this Agreement, the Employer shall have the right to further discipline or discharge such employee without recourse for such repetition. After the first 24 hour period of an unauthorized stoppage in violation of this Agreement, and if such stoppage continues, the Employer shall have the sole and complete right to immediately further discipline or discharge any employee participating in any unauthorized strike, slowdown, walkout, or any other cessation of work in violation of this Agreement, and such employee shall not be entitled to or have any recourse to the grievance procedure.

Terry Hart, currently the Union's secretary-treasurer, was employed by the Union during the time material as a business agent and in that capacity, from approximately January 3, 1986, until April 2, 1992, was assigned to represent the dockworkers and truckdrivers employed at the Respondent's South San Francisco terminal. From January 3, 1986, to May 28, 1991, Hart visited the terminal approximately 40 times; 8 of these occasions occurred between the time Bloss became terminal manager in February 1991 and May 28, 1991. Thirty of the 40 visits were for the purpose of meeting with management representatives, as previously scheduled, and the remaining 10 visits were made for the express purpose of determining whether Respondent was complying with the collective-bargaining agreements and whether employees had grievances or to investigate employees' grievances. Also on those 30 occasions, when Hart went to the terminal for meetings with management, he usually arrived early for the meetings, so he could spend the time prior to the meetings observing whether Respondent was complying with the collective-bargaining agreements and to determine if employees had grievances and to investigate employees' grievances.

Hart engaged in the aforesaid conduct—determining whether Respondent was complying with the collective-bargaining agreements and whether employees had grievances, and to investigate employees' grievances—by walking through the terminal, including its dock, and observing what was going on and speaking to employees, individually and collectively. The employees whom he spoke to were at work and had to stop work to speak with him. He engaged in this conduct without interruption by supervision or management, except on three occasions, described in detail infra, one of which took place on May 28, 1991. Subsequent to management's May 28, 1991 interruption, Hart continued to visit the terminal during working hours for the purpose of speaking to Respondent's employees in order to police Respondent's compliance with the collective-bargaining agreements and to determine if employees had grievances and to investigate employees' grievances. He engaged in this post-May 28, 1991 conduct without interference by supervision or management.

In January 1986, on Hart's first visit as a business agent to the South San Francisco terminal, the following occurred. Hart and David Larsen, the terminal manager, had arranged an 8 a.m. meeting at the terminal. However, Hart came to the terminal at approximately 7:15 a.m., at which time he met on the terminal dock with some of the employees, who at the time were at work. When Larsen observed this, he objected and Hart responded by stating he thought he had every right to hold a meeting with the employees. Larsen answered by stating the terminal was busy that morning and Hart was ''disrupting'' the terminal's operation and asked Hart to leave the dock, and told Hart he would meet with him at 8 a.m., as scheduled. Hart stated he had a right to be there and refused to leave. Larsen acknowledged Hart had a right to be there, but demanded that Hart abide by his scheduled 8 a.m. appointment and asked him to sit in the terminal's lunchroom or go to another part of the dock where he would not be disrupting Respondent's business operations. Hart refused to leave the dock, even after Larsen threatened to call the police to have him removed from the premises, if he did not leave the dock as requested. Larsen then telephoned the

police, but Hart left the premises before the police arrived and did not show up for his 8 a.m. meeting with Larsen.[12]

Charles McLin, who is currently employed at the South San Francisco terminal as a truckdriver, was the Union's chief shop steward at that terminal from approximately January 1990 to approximately January 1992. He testified in this proceeding as a witness for the General Counsel and during cross-examination testified he personally observed management ask Hart not to talk to an employee or to wait a short period of time until the employee was off shift to speak to him, and that he observed Hart comply with this instruction. On his redirect examination, when asked by the General Counsel for the number of occasions he observed the above, McLin answered it occurred once. More specifically, he testified the incident occurred in 1990 or early 1991, during the early morning hours, in a working area, when Hart was questioning one or two employees in connection with grievances. McLin further testified that Bill Hughs, who was the terminal manager at the time, asked Hart not to tie up the whole working crew while he was talking to somebody and that Hart responded by stating ''fine,'' and by telling the employee he had been speaking to that he would speak to him when he got off from work, and that Hart then left the work area and went outside.

Hart during his direct examination by the General Counsel testified, in effect, that other than his above initial encounter with Terminal Manager Larsen in January 1986, supra, and the episode which occurred on May 28, 1991, infra, that management never interrupted him when he was speaking to employees on the Company's premises, However, after McLin's above-described testimony, Hart, who had testified prior to McLin, was recalled by the General Counsel and testified he recalled the above-described incident described by McLin and gave a different account of what occurred on that occasion. He testified, in substance, that Terminal Manager Hughs told him that Hughs needed one of the employee-grievants, who was speaking with Hart, to drive a truck, and that Hart informed Hughs that it posed no problem because Hart could talk to the employee later. Hart further testified that at this point in time he did not leave the premises but remained where he was and continued his conversation with the other employee-grievant and with the union shop steward for another 3 or 4 minutes before leaving the terminal and that during this conversation told the union shop steward to get the other information from the other employee-grievant when he returned to the terminal from his driving assignment. McLin, the union shop steward, did not corroborate Hart's testimony. I reject Hart's testimony and credit McLin's above-described testimony because McLin's testimonial demeanor was good, whereas Hart's was poor.

On Friday, May 24, 1991, McLin, the Union's chief shop steward at the terminal, notified Hart that several employees had filed grievances complaining about harassment by Terminal Manager Bloss and Graveyard Supervisor Gary Margolis. They met that evening and discussed the employees' grievances referred to by McLin, most of which dealt with alleged harassment by Bloss and Margolis. As a result of the unusually large number of grievances, the seriousness of the issues, and McLin's expressed concerns, Hart agreed to visit the terminal the following week, even though he was scheduled to be off from work on his vacation.

On Tuesday, May 28, 1991, at approximately 7:30 a.m. Hart arrived at the South San Francisco terminal for the purpose of investigating the above-described employee grievances. This was toward the end of Respondent's graveyard shift, which ends at 8 a.m. The majority of Respondent's day-shift workers begin work at 8 a.m. On this date Respondent employed no truckdrivers and between 8 and 10 dockworkers on the graveyard shift. Three day-shift workers begin work at 7 a.m. and between 12 and 13 day-shift workers begin work at 8 a.m., and 2 or 3 begin work at 9 a.m. All of the day-shift workers were truckdrivers, except for one dockworker.

It is undisputed that the final hour of the graveyard shift, 7 to 8 a.m., is a particularly hectic time period at the terminal and is the busiest time of the workday there. It is during this period that Respondent's trucks are in the final stages of being loaded and readied for delivery by the dockworkers, whose shift ends at 8 a.m. Since Respondent's dockworkers leave work at 8 a.m. and since Respondent's customers expect their merchandise to be delivered as early in the day as possible, the object of Respondent is to have all of the freight scheduled for delivery that day loaded on its trucks and ready for delivery by 8 a.m. In order to accomplish this objective, not only must the freight be physically on board the trucks by 8 a.m., but the accompanying paperwork must have been processed to completion, which is not possible until all of the freight has been loaded onto a truck. The goal of the 8 to 10 dockworkers employed on the graveyard shift is to complete the loading of the trucks and the processing of the accompanying paperwork by the end of their shift at 8 a.m., so when Respondent's truckdrivers begin work at 8 a.m., the Respondent's dispatchers are in a position to have the drivers leave the terminal with their deliveries without delay.

On May 28, 1991, at approximately 7:30 a.m., Mark Graybill, the operations manager of the terminal, observed Union Business Agent Hart on the terminal dock speaking to a group of approximately five or six of the dockworkers employed on the graveyard shift. Graybill promptly informed Terminal Manager Bloss.

Bloss observed that the only dockworkers at work on the dock were a couple of the workers at the end of the dock where Bloss was standing, but at the other end of the dock, Hart was talking to a group of dockworkers. The terminal's dock is 250 to 300 feet long and approximately 50 feet wide.

Bloss walked to where Hart was talking to the employees. He told Hart it was near the end of the graveyard shift and there was a lot of work left for the employees to do ''to get wrapped up here,'' and stated he would appreciate it if Hart ''could break up this group meeting now.'' Hart ignored Bloss' remark and said a few more things to the employees, and then walked over to Bloss, who had remained approximately 12 feet away from Hart and the employees he was talking to. As Hart walked toward Bloss, the employees dispersed and went back to work. Hart then told Bloss he would talk to anyone he wanted for as long as he wanted, and also stated, ''You're nothing but a fucking waste of a manager,''

[12] The description of the above episode is based on Larsen's testimony. Hart gave a completely different account of what occurred. I credited Larsen's testimony and discredited Hart's because Larsen's testimonial demeanor, which was good, was better than Hart's, which was poor.

''this is my barn, and these are my people and I'm going to represent them.'' Hart also stated that even though he was on his vacation, he was there for the purpose of investigating grievances concerning Graveyard Supervisor Gary Margolis. Bloss replied he did not have any problem with that, and stated if Hart wanted to talk to someone or if he wanted to talk to one or two employees, that Bloss would be more than happy to accommodate him, but asked that Hart not speak to a group of employees, especially during that part of the work shift. Hart responded by stating he intended to talk to whoever and as many of the employees as he wanted, because it was ''his barn'' and ''his'' employees. Bloss stated the employees were Respondent's employees and if Hart intended to continue to disrupt the work flow and continued to speak to Bloss in that manner, Bloss would be forced to ask him to leave. Hart answered he had grievances to discuss and intended to talk to some of the employees. Bloss ended the conversation by replying, ''Okay . . . but don't disrupt the work force'' and went back to his office.

When Bloss got back to his office, he looked out of his office window, which overlooks the terminal's dock, and observed Hart standing at the far end of the dock, approximately 100 feet away, talking to a group of four employees. Bloss immediately returned to the dock and rapidly walked to where Hart was standing talking to the employees. He made eye contact with Hart and waited for a minute until Hart finished talking to the group of employees, at which time three of the employees walked away, leaving Hart speaking to one employee. Bloss overheard the employee complain that Graveyard Supervisor Margolis had lied to him about something and overheard Hart respond by stating it was typical of management to always lie, at which point the employee walked away and Bloss, who was standing a short distance away, now walked up to Hart and told him ''we don't really need that type of sarcasm here and we don't need what's going on here this morning. I told you if this type of thing did not stop, you were going to have to leave. I'm asking you to leave.'' Hart laughed and stated he was not going anywhere, that he intended to talk about the grievances with ''his people'' and with Bloss. Bloss stated Hart had not scheduled a meeting with him to discuss the grievances and that in the light of what had already gone on that morning, Hart should return on another day at which time they would discuss the grievances. Hart laughed and stated he was not going anywhere, and when Bloss again asked him to leave, Bloss stated, ''I'm not leaving here. You do whatever you're big enough to do.'' Bloss ended the conversation by stating, ''All right. I will,'' and went back to his office.

When Bloss returned to his office, he instructed Operations Manager Graybill to telephone the police and waited for the police in his office, while at the same time trying to calm down. Two police officers arrived at approximately 7:55 a.m. Bloss told them Hart was disruptive and was interfering with the work force and stated that ''contractually he was not allowed to do that'' and stated he did not want anymore problems that day and felt Hart needed to calm down and leave the premises.

Bloss then went with the police officers to the employees' breakroom, where Hart was speaking to employees. The breakroom is 14 feet by 20 feet. In order to avoid creating a confrontation between Hart and the police in front of the employees, Bloss entered the breakroom by himself and the police officers waited at the breakroom's doorway. Bloss' intent was to persuade Hart to come out of the breakroom, so the police could speak to him outside of the employees' presence. The time was approximately 8:02 a.m.

Present in the breakroom at this time were 15 truckdrivers employed on the first shift and the 8 to 10 dockworkers employed on the graveyard shift. The first-shift employees had clocked in for work, inasmuch as their work shift had begun at 8 a.m., and the graveyard shift employees had clocked out from work, inasmuch as their shift had ended at 8 a.m.

Bloss told Hart he would like to talk to him outside. Hart stated he still had to talk to employees and asked Bloss to make up his mind, reminding Bloss that Bloss previously had refused to meet with Hart. Bloss told him that what he had refused to do was to meet with Hart to talk about the grievances that day. Bloss also told Hart that if Hart wanted to speak to a particular employee about a grievance, for him to do it in the office and not talk to ''all of these people.'' Hart answered it was his intention to talk about the grievance with ''these people.'' When Hart indicated he did not intend to leave the breakroom, as Bloss was asking, Bloss stated that based on the obscenities that Hart had ''yelled'' while on the dock and the disruption of the work force that morning, that he was asking Hart to leave. Hart replied that Bloss was a liar, that Hart had not, as Bloss alleged, yelled at Bloss. Then, at the top of his voice, Hart screamed: ''I didn't yell at you. This is yelling. When I yell you'll know.'' One of the police officers at this point entered the breakroom and approached Hart and instructed him to come outside, which Hart did.

When the police officer accompanied Hart from the breakroom, Hart identified himself to the officer and stated he was the union business agent and had every right to be there and was going to conduct business with the employees. The police officer stated it was obviously a very agitated situation and he feared there would be a physical altercation. Hart stated there would not be any kind of a physical altercation because Bloss was ''not man enough.'' The police officer told Hart ''we don't need that'' and asked if Bloss, as manager of the property, wanted Hart to leave. Bloss replied by stating he wanted Hart to leave that day and to come back the next day or on any other day, but that today he felt Hart needed to leave. Hart's response was to state, ''If you want me to leave, I'm taking my men with me,'' and asked if Bloss still wanted him to leave, and when Bloss answered in the affirmative, Hart walked back into the breakroom and, speaking to the employees present in the room, stated, ''Come on men.'' In response two or three employees started to walk towards the door and at this point Respondent's operations supervisor/dispatcher, Mike Vega, who had entered the breakroom, stated to the employees in the room:

> We would advise you otherwise . . . you're on the clock, if you walk out the door with this man while you are on the clock, you're abandoning the job. It will be treated as a voluntary quit, and you won't be back.

Hart again stated to the employees, ''come on men.'' Bloss, as well as Vega, responded by stating that if the employees left with Hart it would constitute an illegal walkout and stated in effect that those employees who left with Hart would be terminated. Hart, at this point stated he would call an at-

torney and left the room. When Hart, Vega, and Bloss made their above-described statements, all of the first-shift and graveyard-shift employees, who had been in the breakroom initially at approximately 8:02 a.m., were either still in the breakroom or in the vicinity of the breakroom's door listening to what was being said.

Shortly thereafter, Hart returned to the breakroom and told the employees to remain and work that day and stated that ''they'' would ''take care of [Bloss] in another way,'' legally. Hart then left the breakroom and, as he exited, exchanged a few words with Bloss about whether or not what Bloss had done was permissible under the parties' collective-bargaining agreements. Hart, on this subject, declared that Bloss was ignorant because Bloss had only recently come to the South San Francisco, California terminal from one of the Company's facilities in the State of Arizona, and while Bloss thought he was knowledgeable that he did not know ''shit.'' Bloss replied, ''That may be so, I may be wrong, but I don't need this from you and you need to leave.'' The police officer at this point instructed Hart to leave the premises which he did.[13]

The above-description of what occurred when Hart visited the terminal on May 28, prior to the time of his first encounter with Bloss that morning, is based on Graybill's and Bloss' testimony. The above description of the rest of the day's events is based on Bloss' testimony. I realize that I have generally discredited Graybill's and Bloss' testimony given in connection with the allegation that Respondent violated the Act, when it refused to hire Mendez, in view of their poor testimonial demeanor when they testified in connection with that allegation. However, when they testified about the events which occurred on May 28, Graybill and Bloss impressed me as sincere and conscientious witnesses. Their testimonial demeanor when they gave this testimony—the way they spoke, the tone of their voices, and the way they looked and acted while testifying—led me to conclude they were sincere and conscientious witnesses when they testified about that occurrence, whereas Hart's testimonial demeanor was poor when he testified about the events of May 28. I also note that in certain significant respects the testimony of General Counsel's witnesses Tobin and McLin corroborate Bloss' and contradict Hart's testimony.

Hart denied Bloss indicated he thought Hart was interfering with the Company's work schedule, rather Hart testified, in effect, Bloss' sole criticism of him that day was directed toward Hart's speaking to more than one person at a time and to Hart's alleged yelling and swearing. However, Tobin testified he overheard Bloss on May 28 tell Hart, ''he was interfering with the work schedule, he would have to conduct his business after the shift because there was still 10 or 15 minutes left that we [referring to the graveyard-shift employees whom Hart had been speaking to] could be doing something.''

Hart testified that when Bloss told the police officer that he wanted Hart off the premises, Hart responded by telling Bloss that he still needed to talk to two or three more employees and told Bloss, ''If you force me off the property, they have to come with me and finish giving me their statement.'' However, in corroboration of Bloss' version of what occurred, Tobin testified that Hart warned Bloss if he was ejected from the premises that he would ''tell us guys to get off the dock,'' and the Union's chief shop steward, McLin, testified that when Bloss told the police he wanted Hart evicted from the premises, Hart's response was to state: ''If I go, if I walk, everybody walks.''

On May 28, as he exited the terminal, after having been instructed by the police officer to leave, Hart told the employees he intended to go to Respondent's parking lot, which is adjacent to the terminal's dock. As a matter of fact, Hart moved his car which was parked against the dock to Respondent's parking lot. While there he spoke to the Union's chief steward, McLin, and then remained there for approximately 25 minutes speaking to graveyard-shift workers, including those whom he had not been able to speak to earlier that morning due to his eviction from the terminal. He spoke to them in connection with his grievance investigation. No one objected to his using Respondent's property, the parking lot, for this purpose.

Later the same day, at 5:45 p.m., Hart returned to terminal and went to the employees' breakroom where he spoke briefly to Graveyard Supervisor Margolis and then to the dock where he conducted a safety inspection and then spoke to five or six of the employees, who were working on the dock; he asked them how Margolis treated them when they worked on the swing shift under his supervision. He spoke to them in connection with the grievances he was investigating. No one objected to his presence or made an effort to evict him from the terminal.

Subsequent to May 28, Hart in the next 10 months visited Respondent's terminal on several occasions, without objection, for the purpose of investigating grievances and to administer the collective-bargaining agreements.

Bloss admitted that before and after May 28 he had observed Hart in Respondent's terminal speaking to employees, as he had done on May 28, but that May 28 was the first time he had ever observed Hart engage in this conduct during the period between 7 and 8 a.m. As I have found, supra, the last hour of the graveyard shift (7 to 8 a.m.) is the busiest and most hectic work period at the terminal. Bloss further testified that if he had observed Hart on the terminal dock speaking to employees, the way he did on May 28, at any times other than between 7 and 8 a.m., Bloss would not have objected to Hart's conduct, but objected on May 28 because of his concern about the production problems that occur between 7 and 8 a.m.

[13] Police Officer Philip Schonig, who instructed Hart to leave the terminal, testified when he instructed Hart to leave, ''I felt he was agitated and hostile and posed a safety threat to myself and other people'' and further testified, ''I feared for my safety . . . I don't feel he was rational at that point in my professional opinion.'' As requested by the General Counsel, I have scrutinized Schonig's testimony with ''great care.'' Schonig was a completely disinterested witness, with absolutely no reason to tailor his testimony to suit either the Respondent's or the General Counsel's case, and when he testified about the events of May 28 he impressed me demeanorwise as a credible witness. I also note that his above testimony was corroborated, in part, by the testimony of General Counsel's witness Tobin, one of the graveyard-shift employees present on May 28, who, when asked by the General Counsel if Police Officer Schonig looked nervous, testified, ''everybody . . . was pretty on edge . . . because it was a nervous type happening.''

2. Discussion and conclusions

The alleged unlawful denial of access

It is settled that a union's access to represented employees on an employer's premises is a mandatory subject of bargaining and that an employer's unilateral modification of contractual access provisions violates Section 8(a)(5) and (1) of the Act. *American Commercial Lines*, 291 NLRB 1066 (1988); *West Lawrence Care Center*, 308 NLRB 1011 (1992). However, this is not the issue involved in this case. Here the alleged unfair labor practice does not derive from an unlawful refusal to bargain. The complaint does not allege a refusal to bargain in violation of Section 8(a)(5) of the Act. It alleges Respondent independently violated Section 8(a)(1) of the Act, when, on May 28, 1991, it interfered with, restrained, or coerced its employees in the exercise of their Section 7 rights by, in the presence of its employees, engaging in the following conduct: denying Union Representative Hart access to its employees for the purpose of investigating and processing grievances; and interfering with Hart's investigation and processing of grievances by calling the police and threatening to have Hart arrested.

In G*illiam Candy Co*., 282 NLRB 624 (1987), a Board majority concluded that an employer's conduct independently violated Section 8(a)(1) of the Act, when the employer denied its employees' collective-bargaining representative, Union Business Agent Simmons, access to its plant on three different occasions. In *Gilliam Candy*, the collective-bargaining agreement provided that ''[t]he business representative of the union will be permitted to enter the plant on business at any time during working hours upon first presenting himself to the person in charge.'' The Board's rationale for concluding that the employer's refusal to allow Simmons into the plant violated Section 8(a)(1) was as follows (282 NLRB at 626):

> Thus, it is clear that on all three occasions, Simmons sought entry to the plant for reasons within the scope of the ''on business'' standard for such entry set forth in the collective bargaining agreement, and on all three occasions Simmons was denied such entry for invalid reasons. Accordingly, we agree with the judge that the Respondent has violated the Act as alleged by refusing to grant the employees' collective bargaining representative access to the plant in accordance with the applicable provisions of the parties' collective bargaining agreement.

I am of the opinion that the complaint's allegations, which relate to Respondent's May 28 denial of access to Hart, lack merit for two different reasons: Respondent was privileged by the terms of the applicable provision of the collective-bargaining agreement to restrict Hart's access, as it did on May 28; and, in any event, since the dispute between the Union and Respondent over the extent of Hart's right to speak to employees on Respondent's premises during their working time is essentially a dispute over the meaning of the parties' contract, *under the special circumstances of this case* it would be inappropriate for the Board to determine which of the two contract interpretations is correct. My reasons for these conclusions are set forth hereinafter.

I.

The applicable contract provision, as set forth in detail, supra, gave Union Business Representative Hart the right to enter the Respondent's terminal on May 28, 1991, for the purpose of investigating and processing employees' grievances provided, ''there is no interruption of the firm's working schedule.'' Respondent has established that on May 28 Hart was interfering with the Respondent's working schedule and that this was the reason which motivated Terminal Manager Bloss to evict him from the terminal, after Hart had refused Bloss' request to limit his conversations with one or two employees at a time.

On May 28 Hart entered the Respondent's terminal during the final half hour of the graveyard shift, 7:30 to 8 a.m., the most hectic and busiest time of the day at the terminal. It is then that Respondent's dockworkers, who are employed on the graveyard shift and leave at 8 a.m., are in the final stage of loading the freight onto trucks and finalizing the paperwork, so that when Respondent's truckdrivers arrive for work at 8 a.m., they can leave the terminal with their deliveries without delay. When Hart at approximately 7:30 a.m. on May 28 spoke to dockworkers on the dock about the grievances he was investigating, a group of five or six dockworkers congregated around him on the dock and he spoke to them. Since Respondent employed 8 to 10 dockworkers, the group congregated around Hart constituted at least 50 percent of Respondent's dockworkers. When Terminal Manager Bloss observed that the majority of his dockworkers were not at work, but were gathered around Hart on the dock, Bloss went to where Hart was standing with the employees and told Hart he would appreciate it if Hart ended the group meeting because, as he explained to Hart, it was near the end of the graveyard shift and there was still a lot of work remaining for the dockworkers to do. Bloss also indicated he had no problem with Hart speaking to one or two employees at a time on the Company's premises in connection with his investigation of employees' grievances, but stated he had a problem with Hart speaking to a group of employees and asked Hart not to speak to a group of employees during this part of the work shift.[14] When Hart responded by stating he intended to speak with as many of the employees as he wanted because it was ''his barn'' and ''his'' employees, Bloss warned Hart that if he continued to disrupt the work flow Bloss would have to ask him to leave the premises. Hart ignored Bloss' warning, for almost immediately thereafter, Bloss observed that Hart was speaking to a group of four dockworkers on the dock. Bloss immediately went to

[14] As I have found supra, Bloss credibly testified that if he observed Hart on the terminal's dock speaking to a group of employees, as was the case on May 28, at any time other than between 7 and 8 a.m., the busiest time of the day, Bloss would not have objected to Hart's conduct, but objected on May 28 because of his concern about the production problems that occur between 7 and 8 a.m. Bloss' testimony was corroborated by the fact that, as described supra, it is undisputed that after being evicted from the Company's terminal on May 28, Hart did not leave Respondent's premises but, without objection from Respondent, remained in Respondent's parking lot speaking to graveyard-shift employees about the grievances he was investigating, and later that same day returned to Respondent's terminal and, with no objection from Respondent, spoke to several employees, while they were at work on Respondent's dock, about the grievances he was investigating.

where Hart was standing on the dock with the employees and asked him to leave the premises. When Hart refused, Bloss telephoned the police and, when the police arrived, Hart left the premises after being instructed to leave by the police.

The aforesaid facts establish that when Bloss on May 28 asked Hart to speak to only one or two of the dockworkers at a time, while speaking to them on Respondent's premises during the busiest hour of the workday, or to leave the Respondent's premises, that Hart was interrupting Respondent's working schedule and this was the reason why Bloss asked him to leave the premises. In so concluding, I considered the General Counsel's following contentions: (1) the past practice of the parties establishes that Respondent has interpreted the applicable contractual access provision, so as to permit the Union's authorized agents to speak to groups of employees during the last hour of the graveyard shift; (2) the evidence is insufficient to establish that Hart's May 28 conduct of speaking to groups of employees was interrupting the Respondent's working schedule; (3) the evidence establishes that Bloss did not call the police or ask Hart to leave the premises on May 28 because Hart was interrupting the Respondent's work schedule, but establishes Bloss engaged in this conduct for other invalid reasons; and (4) to the extent Hart was evicted from the premises because he was speaking to the graveyard-shift employees in the breakroom, Hart could not have been interrupting the Respondent's work schedule. I reject these contentions for the reasons hereinafter.

The contention that Hart's May 28, 1991 conduct which Bloss objected to—Hart speaking to groups of dockworkers during the busiest part of the workday—was consistent with Hart's past practice which Respondent had permitted, is based entirely upon Hart's testimony given during cross-examination. In this regard, he was asked by Respondent's counsel, ''You didn't realize that by being on that dock between 7:30 a.m. and 8 a.m. on a weekday, that you could reek substantial havoc on the ability to get those loads ready for the drivers coming on at 8 a.m.?'' He answered, ''No,'' and then was asked, if, on May 28, anyone from Respondent told him he was disrupting Respondent's business because it was very busy at that time of the day and Respondent would prefer he return the next day, or say to him words to that effect? Hart answered, ''No,'' and then volunteered, ''it was common practice for me to be there at that time.'' As I have found supra, Bloss on May 28 did give Hart such an explanation. I am convinced that just as Hart was not truthful when he denied that Bloss on May 28 gave him such an explanation, he was also not truthful when he volunteered that it was his ''common practice'' to be at the terminal between 7:30 and 8 a.m.[15] As was the case with his testimony concerning the events of May 28, his testimonial demeanor was not good when he gave this testimony. Also the testimony was completely lacking in specificity; Hart did not give one example of another occasion when he visited the terminal, without objection, between 7 and 8 a.m. or between 7:30 and 8 a.m., to speak with employees, nor did he explain why it was his common practice to visit there at that time, nor did he testify that when he commonly, as a matter of practice, visited the terminal during that time period, that he spoke to groups of dockworkers, even though it was the busiest part of their workday.[16] It is for the foregoing reasons that I reject Hart's testimony and find there is a lack of evidence to support the General Counsel's contention that Hart's May 28 conduct was consistent with his past practice and had been permitted by Respondent.

The General Counsel's further contention that there is a lack of evidence that Hart's May 28 conduct interrupted Respondent's working schedule, lacks merit because of the following evidence: the final hour of Respondent's graveyard shift, 7 to 8 a.m., is a particularly hectic time period at the terminal and is the busiest time of the workday there, because it is during this time that Respondent's dockworkers, whose shift ends at 8 a.m., are in the final stage of loading Respondent's trucks and submitting the accompanying paperwork to the office personnel, so that Respondent's truckdrivers, who start work at 8 a.m., can leave with their deliveries as soon as possible after 8 a.m.; it was during this time period on May 28 that Hart visited Respondent's terminal to speak to the dockworkers in connection with his investigation and processing of the employees' grievance; at approximately 7:30 a.m. Bloss observed that only two of Respondent's 8 to 10 dockworkers were at work on the dock and that between 50 and 60 percent of the dockworkers were grouped around Hart on the dock and he was speaking to them; Bloss immediately told Hart he would appreciate it if Hart could break up the group meeting because it was near the end of the graveyard shift and there was a lot of work left for the dockworkers to do in order ''to get wrapped up here''; and, shortly thereafter, Bloss observed that Hart had ignored his request and was talking to a group of four of the dockworkers, which meant that between 40 and 50 percent of the dockworkers were not working on account of Hart. I am of the opinion that based upon the aforesaid evidence Respondent made a prima facie showing that Hart's May 28 conduct, which Bloss found objectionable, had interrupted Respondent's working schedule. I also find the General Counsel failed to present sufficient evidence to rebut this inference.

In contending that Bloss evicted Hart from the terminal for invalid reasons, rather than because Bloss thought Hart was interrupting Respondent's work schedule, the General Counsel argues that ''what set off Bloss [referring to his decision to evict Hart] was Hart's attitude, actions, and conduct when Hart insisted on continuing to investigate grievances, told an employee that managers lie and did not treat Bloss with sufficient respect.'' I disagree. Rather, I am of the view that the events of May 28, set forth in detail, supra, establish that ''what set off Bloss was Hart's attitude, actions and conduct

[15] Bloss credibly testified that during the 3 months prior to May 28, 1991, he had been terminal manager, May 28 was the only time, to his knowledge, that Hart ever visited the terminal to speak to employees during the busiest and most hectic time of the day (7 to 8 a.m.).

[16] The sole evidence of what did occur when Hart, prior to May 28, 1991, visited Respondent's terminal between 7 and 8 a.m. and spoke to a group of dockworkers is former Terminal Manager David Larsen's testimony, set forth in detail supra, that when Hart in January 1986 first visited the terminal, he arrived at approximately 7:15 a.m. and at that time met with a group of the dockworkers on the terminal dock, that Larsen objected to Hart meeting with the dockworkers at that time of the day, told Hart he was disrupting the terminal's operations, and when Hart refused to obey Larsen's request that he leave the dock, Larsen telephoned the police for the purpose of having him evicted.

when Hart insisted on continuing to investigate grievances,'' *by speaking to groups of dockworkers*, even after Bloss had asked Hart to stop speaking to groups of dockworkers because, as he explained to Hart, it was interrupting Respondent's production schedule. Thus, as described in detail, supra, what triggered Bloss' May 28 decision to evict Hart was Hart's refusal to obey Bloss' request that to minimize the interruption of production, Hart speak to only one or two dockworkers at the same time, rather than to groups of more than one or two, as he had been doing. It was in the context of Hart's refusal to do this that Hart acted disrespectful toward Bloss and that Bloss overheard Hart state it was typical of management to lie to employees. In other words, all of the conduct which the General Counsel contends motivated Bloss to evict Hart was part of the res gestae of Hart's refusal to comply with Bloss' request that Hart, in order to minimize the interruption of production, not speak to groups of dockworkers, but limit his conversations with one or two at a time.

As previously indicated, the General Counsel's final contention is that since the dockworkers' shift ended at 8 a.m., Hart could not have been interrupting Respondent's production schedule when he spoke to them in the breakroom after 8 a.m., thus Respondent, the General Counsel argues, acted improperly under the terms of the contractual access provision, when it had the police evict Hart from the breakroom at that time. This argument lacks merit because, as set forth in detail, supra, the record establishes that when Hart was evicted by the police from the terminal, he just happened to have been in the employees' breakroom. He was not evicted by the police at that time, pursuant to Bloss' instruction, because he was speaking to the dockworkers, who were gathered in the breakroom. Rather he was evicted from the terminal because of his earlier refusal to obey Bloss' request that, to minimize the interruption of Respondent's production schedule, he not speak to groups of dockworkers, but limit his conversations with one or two of them at a time, when investigating the employees' grievances during the busiest hour of the workday. That Hart was not evicted by the police, pursuant to Bloss' request, because he was speaking to the dockworkers in the breakroom, is acknowledged by the General Counsel in that part of her posthearing brief which states:

> It should be noted that Bloss ordered Hart off the premises and called the police, before Hart returned to the breakroom, so any claim that he was ordered to leave and the police were called because of an alleged group meeting in the breakroom should be rejected.

II.

Even if I have erred and Respondent has not established it was privileged under the terms of the applicable contract provision to limit Union Business Agent Hart's access to the unit employees, as it did on May 28, 1991, I am of the opinion, for the reasons set forth hereinafter, it would be inappropriate for the Board, under the special circumstances of this case, to determine whose interpretation of the contract is correct, Respondent's or the Union's and, for that additional reason, I find there is no merit to the complaint's allegations charging Respondent with violating the Act by denying access to Hart on May 28, 1991, and by having the police evict him from its premises on that day in connection with the denial of access.

In cases where, as here, an employer is charged with violating the Act because it engaged in conduct in derogation of the terms of its collective-bargaining agreement with a labor organization, the Board will not find a violation where the employer has ''a sound arguable basis for ascribing a particular meaning to his contract,'' where his action ''is in accordance with the terms of the contract as he construes it,'' and where ''there is 'no showing that the employer in interpreting the contract as he did, was motivated by union animus or was acting in bad faith.''' *Vickers, Inc*., 153 NLRB 561, 659–570 (1965), quoting from *United Telephone Co. of the West*, 112 NLRB 779, 781 (1955). Accord: *Crest Litho*, 308 NLRB 108 (1992); *Thermo Electron*, 287 NLRB 820–820 (1987); *Atwood & Merril Co*., 289 NLRB 794, 794–795 (1988); *Plasterers Local 627 (Jack Hart Concrete)*, 274 NLRB 1286, 1287–1288 (1985); *NCR Corp*., 271 NLRB 1212, 1213 (1984).

As described in detail, supra, Union Business Agent Hart was privileged by the terms of the applicable provision of the collective-bargaining agreement between the Union and Respondent to enter Respondent's terminal on May 28, 1991, and speak to Respondent's employees in connection with his investigation and processing of employees' grievances, provided, as set forth in the applicable contract provision, ''there is no interruption of the firm's working schedule.'' Whether, as alleged in the complaint, Respondent violated the Act on May 28 when it limited Hart's access to dockworkers and evicted him from the premises when he refused to comply with that limitation, depends solely on the application of that contract provision to the facts of this case.

Respondent had a sound arguable basis for contending that the restriction it imposed on Hart's access—it refused to allow him to speak to groups of dockworkers during the busiest hour of the workday, but only to one or two at a time—comported with the contractual requirement that union access to its facility was conditioned on there being no interruption with the Respondent's working schedule. There is also no evidence that Respondent's action involved animus, bad faith, or an attempt to undermine the Union's representative status or to obstruct the overall grievance procedure. Quite the opposite, the isolated and extremely limited nature of the restriction imposed on Hart's access to the employees on May 28, 1991, would make frivolous any contention that the restriction imposed upon Hart on that day was motivated by union animus or as part of an effort by Respondent to undermine the basic bargaining relationship or to obstruct the overall grievance procedure.

Moreover, in view of the extremely limited nature of the restriction imposed on Hart's ability to speak to the employees on Respondent's premises, it is clear that the restriction did not significantly reduce employee access to Hart, since the net effect was to merely deny Hart the right to speak to more than one or two employees at a time during the busiest hour of the workday. See *Peerless Food Products*, 236 NLRB 161 (1978). Thus, as described in detail, supra, on May 28, Respondent notified Hart that he could speak to one or two of its dockworkers at a time during their working time, in order to investigate the employees' grievances. It only refused to allow him to speak to groups of more than one or two dockworkers, during that 1-hour period from 7

to 8 a.m., which is the busiest and most hectic part of the workday. In addition, Respondent made it clear to Hart that he was welcome to return to the terminal to complete his grievance investigation the next day or at any other time which suited his convenience. In fact, on the morning of May 28 after being evicted by the police from the Respondent's premises, Hart did not leave Respondent's property, but instead went to Respondent's parking lot where, without objection from Respondent, he spoke with several of the off duty dockworkers about the employees' grievances, and later that same day, returned to the terminal and, again without objection by Respondent, spoke to several of the Respondent's employees on the terminal dock during working time, about the employees' grievances he was investigating. In addition, during the approximately 5 years prior to May 28, 1991, that Hart represented the Respondent's employees, and during the several months subsequent to May 28, 1991, prior to his ceasing to be the employees' representative, Hart visited the terminal on numerous occasions to speak to employees during their working hours and except for what occurred on May 28, 1991, and on two other isolated occasions, discussed, supra, when he was interrupting the Respondent's working schedule, Hart did whatever he had to do on Respondent's premises, without objection by Respondent's officials.

Considering all of the above circumstances, it would be inappropriate for the Board to determine whose interpretation of the applicable contract provision is correct, and for that additional reason I shall recommend the dismissal of the complaint's allegations charging Respondent with violating Section 8(a)(1) of the Act by denying Hart access to the employees on May 28, 1991, and by having the police evict him from its premises on that day. *Harrah's Club*, 143 NLRB 1356, 1369–1371 (1963).

The Alleged Unlawful Threat to Terminate Employees

The facts pertinent to the complaint's allegation that Respondent violated Section 8(a)(1) of the Act on May 28, 1991, when it threatened to terminate employees if they engaged in Union or other protected concerted activities, have been set forth in detail, supra, and may be briefly summarized as follows.

On May 28 the police, pursuant to Terminal Manager Bloss' request, evicted Union Representative Hart from the terminal after Hart, as I have found, supra, refused to comply with Respondent's lawful restriction on his access to the terminal that day. On being informed he was being evicted from the terminal, Hart told Bloss that ''if you want to me leave, I'm taking my men with me'' and went back into the terminal's employee breakroom, where the following employees were present: the 15 truckdrivers, who had just punched in for work and were in the process of being assigned their deliveries by the Respondent's operations supervisor/dispatcher; and the 8 to 10 dockworkers whose work shift had just ended and who had already clocked out from work and were in the process of going home.

Bloss, when he entered the breakroom, stated to the employees ''come on men,'' indicating he wanted them to leave with him. Respondent's operations supervisor/dispatcher, Vega, responded by informing the employees: ''We would advise you otherwise . . . you're on the clock, if you're walk out the door with this man while you are on the clock, you're abandoning your job. It will be treated as a voluntary quit, and you won't be back.'' When Hart again stated, ''come on men,'' indicating he wanted them to leave the premises with him, both Vega and Bloss stated, in effect, that those employees who left with Hart would be terminated for engaging in an illegal walkout.

As described in detail, supra, what led to Hart's call for a walkout and to Respondent's threat to terminate those employees who walked out, was the dispute between Hart and Bloss over the application of the provision in the parties' contract dealing with the right of Hart to have access to Respondent's terminal for the purpose of performing his duties as union representative. It is also undisputed, as described in detail, supra, that the collective-bargaining agreement provided that this dispute was covered by the contract's grievance-arbitration provisions and specifically prohibited the employees from engaging in a work stoppage or a walkout in connection with the dispute. However, the applicable provision in the collective-bargaining agreement also stated that in the event such an unauthorized work stoppage did occur, that

> the Employer during the first 24 hour period of such unauthorized work stoppage in violation of this Agreement, shall have the sole and complete right of reasonable discipline, including suspension from employment, up to and including 30 days, but short of discharge, and such employee shall not be entitled to or have any recourse to the grievance procedure. . . . After the first 24 hour period of an unauthorized stoppage in violation of this Agreement, and if such stoppage continues, the Employer shall have the sole and complete right to immediately further discipline or discharge any employee participating in any unauthorized strike, slowdown, walkout, or any other cessation of work in violation of this Agreement, and such employee shall not be entitled to or have any recourse to the grievance procedure.

The General Counsel contends that Respondent's threat to terminate the employees if they followed Hart's advice on May 28 and walked out violated Section 8(a)(1) of the Act because the walkout constituted the type of concerted or union activity protected by Section 7 of the Act. Respondent argues that by virtue of the above-described no-strike clause in the parties' collective-bargaining agreement the Union waived the Section 7 right of the employees to walk out and because of this the walkout would not have been protected by Section 7 of the Act. The General Counsel takes the position that the contractual no-strike clause's prohibition against discharge during the first 24 hours of an unauthorized strike implies that work stoppages lasting less than 24 hours are permitted. Respondent argues that the intent of this clause was not to forbid discharges during the first 24 hours of an unauthorized strike, but to create an exception for workers discharged during that period from the provision that workers disciplined for participation in unauthorized walkouts are not entitled to have recourse to the grievance procedure of the agreement. Lastly, the General Counsel contends that even if Respondent's interpretation is correct, its threat to discharge was unlawful because it was directed to all of the employees in the breakroom, those whose work shift had already ended as well as those whose work shift had just started.

I agree with the General Counsel's contention that those employees in the breakroom whose work shift had ended (the 8 to 10 dockworkers) would not have been engaged in an unauthorized work stoppage, if they had joined Hart and left the Respondent's premises shortly after 8 a.m. on May 28. Accordingly, if Respondent's threat to discharge was reasonably calculated to coerce any of the dockworkers from leaving the premises with Hart, it violated Section 8(a)(1) of the Act. I am of the view, however, that it did not reasonably tend to do this. Initially, I note that the dockworkers, whose work shift had just ended, were in the process of leaving Respondent's facility to go home and would have done so even absent Hart's call that they leave with him. Under the circumstances, because they were off duty and were not obligated to remain at work, it would be unrealistic for me to infer that when they heard the threat of termination that they would have reasonably believed that Respondent's intent in making it was to require them to remain in the breakroom, even though their shift had ended and they had punched out and were on their way home. Rather, the more reasonable interpretation of such a threat would have been to alert them that if at the start of their next shift, they obeyed Hart's request that they not go to work, they would be placing their jobs in jeopardy. In any event, any ambiguity was removed by Operations Supervisor Vega's explanation, made to the employees in the breakroom: ''*You're on the clock*, if you walk out the door with this man *while you are on the clock*, you're abandoning your job.'' Plainly this explanation was reasonably calculated to alert the graveyard-shift employees that the threat of discharge was directed only to those employees whose work shift had just started and not to those whose shift had just ended and were no longer ''on the clock.''

The final issue framed by this allegation of the complaint is whether by virtue of the contractual no-strike clause the Union waived the employees' statutory right to engage in a strike of less than 24 hours in support of Union Representative Hart's interpretation of the contractual access provision. Since, as I have found, supra, such a strike would be an unauthorized strike under the terms of the contractual no-strike clause, it would seem to follow that employees who engaged in such a strike would not be engaged in protected activity within the meaning of Section 7 of the Act and, because of this, the Respondent would not violate the Act by threatening to immediately discharge the employees if they engaged in such a strike. However, in *Wagoner Transportation* and *Food Fair Stores*,[17] not cited by either the General Counsel or respondent, the Board ruled to the contrary.

In *Wagoner Transportation* and *Food Fair Stores*, the respondent employer's employees engaged in an unauthorized walkout which lasted less than 24 hours, in the context of a no-strike clause which was virtually the same as the one in the instant case. As in this case, the no-strike clause in those cases provided that employees participating in an unauthorized walkout lasting less than 24 hours were subject to ''reasonable discipline short of discharge,'' but after 24 hours they could be discharged ''immediately'' without recourse to the contractual grievance procedure. In *Wagoner Transportation*, supra, and *Food Fair Stores*, supra, the Board affirmed the findings and conclusions of the trial examiner that the employees' walkout, which was not authorized by the contractual no-strike clause, constituted concerted activity protected by Section 7 of the Act and that the employees' statutory right to engage in the unauthorized walkout had not been waived by the contractual no-strike clause, therefore the Board held that the respondent employers violated the Act by discharging those employees who participated in the unauthorized strike, and in *Wagoner Transportation* also found that the respondent employer further violated the Act by threatening to immediately discharge employees who engaged in an unauthorized strike of 24 hours or less.

In *Food Fair Stores* , the Board relied on its decision in *Wagoner Transportation*, and in *Wagoner Transportation* the Board adopted the decision of the trial examiner, who, in finding that the employees' unauthorized walkout constituted protected concerted activity, reasoned as follows:

> [I]t is clear from the Agreement itself that the parties agreed that the extreme penalty of discharge would not be applicable to employees who participated in unauthorized strikes of less than 24 hours duration, as the Agreement gives the Respondent as an Employer only the right to impose ''reasonable discipline short of discharge'' upon such employees. It is accordingly held that to the extent that the Agreement prohibited the Respondent from exacting the extreme penalty of discharge on employee-participants in wildcat strikes of less than 24 hours duration, such strikes are protected activities under the provisions of Section 7 of the Act. [177 NLRB at 457.]
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> . . . .
>
> If the Agreement had given Respondent the unqualified right to fire immediately any employee who engaged in unauthorized strike, the threats, . . . would have had protected status. . . . But that was not the situation in the instant case. The Master Agreement did not give the Employer the right to discharge an employee who engaged in an unauthorized strike of 24 hours or less; on the contrary, as seen, the Agreement gave Respondent only the right of reasonable discipline short of discharge for such infractions of the Agreement, and the absolute right of discharge only if the engagement was in a work stoppage of 24 hours or more. Since strikes have protected status under the Act and since Respondent under the Agreement did not have the right to fire employees who engage in wildcat strikes of 24 hours duration or less, it follows that Respondent did not have the right to threaten discharge to employees who engage in such brief strikes although unauthorized. [177 NLRB at 462.]

I have considered that the Third Circuit Court of Appeals in *Food Fair Stores*, supra, refused to enforce the Board's decision, holding that because the employees walkout breached the contractual no-strike clause, it was not the type of conduct which was protected concerted activity within the meaning of Section 7 of the Act. The court found that the 24-hour clause regulated permissible discipline but did not create an exception to the agreement's ban on strikes. The

[17] *Wagoner Transportation Co.*, 177 NLRB 452 (1969), enfd. 424 F.2d 628 (6th Cir. 1970) (per curiam); *Food Fair Stores*, 202 NLRB 347 (1973), enf. denied 491 F.2d 388 (3d Cir. 1974).

court found ''unpersuasive'' the Board's interpretation of the 24-hour clause as preserving the employees' statutory right to strike free from discharge during the first 24 hours of the walkout. In this regard, the court reasoned:

> Even assuming that the 24-hour clause prohibits the discharge of employees who participate in an unauthorized walkout lasting less than 24 hours, it does not follow, as a matter of sound construction or of logic, that such a walkout is thereby excepted from the no-strike provision of the Agreement and is, therefore, protected by the Act. . . . there is nothing in the language of [the no strike provision] that specifically permits an unauthorized walkout of less than 24 hours duration. Furthermore, no intent to do so can be inferred from a prohibition of discharge during a walkout. The purpose of that prohibition would seem to be to give the employees who participate in an unauthorized work stoppage a day to reconsider their action before being subject to the extreme penalty of discharge. However, there is no question that under the terms of [the no strike provision] the Company retains the power to impose reasonable discipline short of discharge upon employees who participate in an unauthorized work stoppage lasting less than 24 hours. That provision is consistent with the other terms of the agreement only on the assumption that such a strike is still illegal under the agreement. While it is true that the source of that illegality may be the unauthorized nature of the strike, rather than the work stoppage itself, the policy behind the language of [the no strike provision] can hardly be said to permit strikes of less than 24 hours' duration. Thus, the strike in this case was in violation of the no-strike clause of the collective bargaining agreement and hence was not protected by the Act. [491 F.2d at 396.]

I find the court's reasoning persuasive, but as an administrative law judge of the Board, I must abide by the Board's decisions in *Wagoner Transportation*, supra, and *Food Fair Stores*, supra. Accordingly, based on those decisions, I find that on May 28, 1991, Respondent violated Section 8(a)(1) of the Act by reason of its threats of immediate discharge of employees who engaged in a work stoppage unauthorized by the no-strike provisions of the Union's collective-bargaining agreement with the Respondent.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing to hire John Mendez on April 1, 1992, because he sought the advice and assistance of his union representative about his terms and conditions of employment, Respondent violated Section 8(a)(1) and (3) of the Act.

4. By asking Mendez on March 6, 1992, what he thought of the Union and by warning him that he would never be hired by Respondent as a regular employee if he was seen talking to his union shop steward, Respondent violated Section 8(a)(1) of the Act.

5. By informing employee Lawrence Holland early in March 1992, that Respondent did not intend to hire Mendez because he was seen speaking to the union shop steward, Respondent violated Section 8(a)(1) of the Act.

6. By threatening employees on May 28, 1991, with immediate discharge if they engaged in an unauthorized work stoppage, where the collective-bargaining agreement between the Union and the Respondent grants the employees immunity from discharge for the first 24 hours of participation in such unauthorized activities, Respondent violated Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent violated the Act by refusing to hire John Mendez on April 1, 1992, I shall recommend that Respondent offer to place Mendez on the seniority list it maintains for its regular employees at its South San Francisco terminal, and date his terminal seniority as of April 1, 1992, or, if that position no longer exists, offer Mendez a substantially equivalent position, without prejudice to his seniority or any other rights and privileges. I shall also recommend that the Respondent make whole Mendez for any loss of earnings and other benefits he may have suffered as a result of Respondent's unlawful refusal to hire him on April 1, 1992, with backpay to be computed in the manner set forth in *F. W. Woolworth Co*., 90 NLRB 289 (1950), and with interest to be computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I shall also recommend that the Respondent remove from its records any reference to the unlawful refusal to hire, provide Mendez with written notice of the removal, and inform him that the unlawful refusal to hire will not be used as a basis for future personnel action concerning him. See *Sterling Sugars*, 261 NLRB 472 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Respondent, Yellow Freight Systems, Inc., South San Francisco, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire or to otherwise discriminate against its employees or applicants for regular employment, because they have sought the assistance or advice of a union shop steward or representative.

(b) Questioning employees or applicants for regular employment about their union sympathies or activities.

(c) Threatening applicants for regular employment that they will not be hired if they are observed speaking to or seeking the assistance or advice of a union shop steward or representative.

(d) Telling employees that it will not hire an applicant for regular employment because he/she was seen speaking to or

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

seeking the assistance and advice of a union shop steward or representative.

(e) Threatening employees with immediate discharge if they engage in an unauthorized work stoppage, where the collective-bargaining agreement between the Union and Respondent grants the employees immunity from discharge for the first 24 hours of participation in such unauthorized activities.

(f) In any like or related manner interfering with, restraining, or coercing its employees or applicants for regular employment in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to place John Mendez on the seniority list it maintains for its regular employees and to date his terminal seniority as of April 1, 1992, or, if that position no longer exists, offer Mendez a substantially equivalent position, without prejudice to his seniority or any other rights or privileges, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful refusal to hire John Mendez and notify him in writing that this has been done and that this refusal to hire will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in South San Francisco, California, copies of the attached notice marked ''Appendix.''[19] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the complaint in Case 20–CA–24053 be, and it is, dismissed insofar as it alleges that Respondent violated the Act otherwise than as found herein.

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to hire or to otherwise discriminate against our employees or applicants for regular employment, because they have sought the assistance or advice of a Teamsters Local 85 shop steward or representative.

WE WILL NOT question employees or applicants for regular employment about their union sympathies or activities.

WE WILL NOT threaten applicants for regular employment that they will not be hired if they are observed speaking to or seeking the assistance and advice of a Teamsters Local 85 shop steward or a representative of that Union.

WE WILL NOT tell our employees that we will not hire an applicant for regular employment because he/she was seen speaking to or seeking the assistance and advice of a Teamsters Local 85 shop steward or of a representative of that Union.

WE WILL NOT threaten our employees with immediate discharge if they engage in an unauthorized work stoppage, where our collective-bargaining agreement with Teamsters Local 85 grants the employees immunity from discharge for the first 24 hours of participation in such unauthorized activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees or applicants for regular employment in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer to place John Mendez on our seniority list for regular employees and to date his terminal seniority as of April 1, 1992, or, if that position no longer exists, offer him a substantially equivalent position, without prejudice to his seniority or any other rights or privileges, and make him whole for any loss of earnings and other benefits suffered as a result of our discrimination against him, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to our unlawful refusal to hire John Mendez and notify him in writing that this has been done and that this refusal to hire will not be used against him in any way.

YELLOW FREIGHT SYSTEMS, INC.